IN THE

Supreme Court of the United States

October Term, 1946.

No. 687.

---

vs.

Appeal From the District Court of the United States for the Southern District of California.

Brief of Appellees Paul Mallonee, C. H. Newhouse, Winnie Bucklin, Shareholders' Members' Protective Committee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 687.

JOHN H. FAHEY, individually, JOHN H. FAHEY, as the Federal Home Loan Bank Commissioner, and A. V. AMMANN, individually, and A. V. AMMANN, as Purported Conservator for the Long Beach Federal Savings and Loan Association,

Appellants,

(Defendants below)

vs.

PAUL MALLONEE, C. H. NEWHOUSE, and WINNIE BUCKLIN, individually, and as Representatives of a class, suing for, and on behalf of, all the members of the Long Beach Federal Savings and Loan Association,

Appelles,

(Plaintiffs below)

THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION,

Appellee,

(Defendant and Cross-Claimant below).

TITLE SERVICE COMPANY,

Appellee,

(Defendant and Cross-Claimant in Interpleader, below).

ROBERT H. WALLIS,

Appellee,

(Defendant and Cross-Claimant in Interpleader below).

FEDERAL HOME LOAN BANK OF LOS ANGELES,

Appellee,

(Third Party Defendant below).

Brief of Appellees Paul Mallonee, C. H. Newhouse, Winnie Bucklin, The Shareholder Members' Protective Committee.

Opening Statement.

This litigation was commenced by the plaintiffs, The Shareholder Members' Protective Committee [R. 1-17] suing for and on behalf of some 16,000 [R. 77, 202] Long Beach citizens, whose $26,000,000.00 in savings [R. 2, 3, 4, 33, 55, 67, 73, 77, 101 and 221; has been unconstitutionally seized by the defendant-appellants John H. Fahey and A. V. Ammann [R. 105] from the admittedly solvent [R. 525] Long Beach Federal Savings and Loan Association, without notice, hearing or cause [admitted by failure to deny, R. 524].

This was the second of a chain of such seizures, the first was the seizure, without notice, hearing or cause [R. 353, 377], of the admittedly solvent Federal Home Loan Bank of Los Angeles and its $43,000,000.00 in assets [R. 8, 26, 208, 209, 287], which included approximately $381,000.00 of the assets belonging to these plain-

tiffs, the shareholder members of the Long Beach Federal Savings and Loan Association [R. 208, 225-226].

The seizure of the Federal Home Loan Bank of Los Angeles was followed by its instantaneous dissolution, liquidation and merger, and the commingling of its assets with those of the Federal Home Loan Bank of Portland, and the instantaneous creation of a so-called new entity, the Federal Home Loan Bank of San Francisco with the proceeds [R. 291-295, 287].

All of this was done on the same day, without the consent of the shareholder members of any of said institutions [R. 627, 700].

Both of these seizures and transmutations of the funds of the thousands of shareholder members constituted a deprivation of their property without due, or any process, and were in violation of and repugnant to the Constitution of the United States.

Primary Question.

Is Section 5(d) of the Home Owners Loan Act of 1933, as amended, repugnant to the Constitution of the United States as being a delegation of unlimited legislative authority without providing any of the safeguards of due process required by the United States Constitution?

NOTE: The above question is the primary question because:

If the unanimous opinion of the Statutory Three Judge Court, declaring Section 5(d) of the Home Owners Loan Act of 1933, as amended, unconstitutional, is found to be correct and its decree affirmed, and thereby becomes the law of the case, it will be determinative of most of the

other issues in this litigation and the trial court can then expeditiously determine the remaining issues of accountings, clearing of titles to approximately 8,000 parcels of real property in southern California, and the restoration of said association and its assets to the management of its duly elected officers and directors, etc.

Whereas, a decision holding said Section 5(d) to be constitutional, or a decision on any of the other numerous collateral questions raised by appellants, in their efforts to reverse the unanimous opinion of the statutory three judge court, would not be determinative of this litigation, but would necessitate further extensive proceedings in the trial court to determine secondary issues, such as whether or not the discretion of the commissioner, if any, had been properly exercised, and similar secondary questions. Under the administration of the defendant-appellants there had already been a net loss in shareholder members' savings accounts of $10,000,000.00 [R. 392, and Affidavit of L. D. White filed in Supreme Court in support of Motion to Vacate Stay of Execution].

If the decree appealed from is reversed, the disposition of the collateral matters would provide grounds for subsequent appeals to this court, with the result that the litigation would be unduly prolonged and result in the ultimate loss to the plaintiffs of the subject matter of this litigation, irrespective of the ultimate outcome.

Plaintiffs, therefore, respectfully direct the attention of this Honorable Court to the determination of the primary question, to-wit: the unconstitutionality of Section 5(d) of the Home Owners Loan Act of 1933, as amended.

This issue of constitutionality was thoroughly considered by the court below after the filing of exhaustive points and authorities, affidavits and after oral argument and is here set forth in the belief it well presents this issue of prime importance in this appeal by the court which had the benefit of a personal appraisal of the facts and parties.

The Opinion Below of the Statutory Three Judge Court

Filed Sept. 5, 1946, in the District Court of the United States for the Southern District of California, 68 Fed. Supp. 418.

The Court below carefully considered the constitutional features of this litigation as is evidenced by their unanimous opinion as follows [R. 374-378]:

Opinion.

"Orr, Circuit Judge: The Long Beach Federal Savings and Loan Association was organized in 1934 under the Federal Home Loan Bank Act as amended. At the time of its incorporation its assets had a value of approximately $7,500. It has had the same president and board of directors during the ensuing years under whose management and guidance the institution has expanded to a point where, at the time of the seizure hereinafter referred to, its assets were of a value of approximately $26,000,000. It was at the time of seizure entirely solvent, with assets, in addition to an amount sufficient to pay its obligations, in the form of reserves and undivided profits in the sum of $1,300,000.

On May 20, 1946, A. V. Ammann, by virtue of his appointment as a conservator for said institution

by John H. Fahey, Administrator, took charge of said institution, and has since been in possession thereof. The conservator took over the Long Beach Federal Savings and Loan Association without notice or hearing of any kind. Subsequent to the taking possession of the bank an administrative hearing was ordered.

Plaintiffs are shareholders in the Long Beach Federal Savings and Loan Association. Several petitions in intervention and third party claims have been filed. All but one of them have joined in the actions of the original plaintiff for injunction.

Temporary orders were issued restraining the merger of the institution with other institutions of like character and restraining the commissioner from holding an administrative hearing.

At the request of certain of the parties a three-judge court was convened under authority of §380(a) of the Judicial Code (28 U. S. C. A., §380(a)).

Defendant Ammann has challenged the jurisdiction of the three-judge court to hear and determine the application for the restraining orders on the ground that the provisions of §380(a) have no application to the law and the facts as presented by said applications. Defendant Ammann's position is: That the instant proceeding seeks to restrain the operation of rules and regulations promulgated by the Board rather than the enforcement, operation or execution of or setting aside in whole or in part of an act of Congress on the ground that the law itself is unconstitutional.

We think the contention is without merit.

Authority to do the acts sought to be restrained, if found to exist, must be bottomed on subsection (d)

of §5[1] of the Federal Home Loan Bank Act as amended. It is on the direct operation of this statute that the commissioner must rely.

Threatened action under the authority of the statute is sought to be restrained on the ground that the statute is unconstitutional and void in that it attempts to confer legislative power on the board. Clearly this proceeding comes within the provisions of §380(a) and the question is required to be heard by a three-judge court.

Appellants [error in printed record obviously refers to appellees here][1a] concentrate their attack on subsections (a) and (d) of §5 of the Act. It is argued that subsection (d), in attempting to authorize the board to make rules and regulations for the purposes mentioned in said subsection (d) delegates legislative power to the board without prescribing either adequate, or any statement of policy, standards, limitations or criteria to guide the board in exercising its functions and is contrary to Article I, Section 1, and Article I, Section 8 (paragraph 18), of the Constitution of the United States (U. S. C. A. Constitution, Article I, Sec. 8, Clause 18).

It is agreed that functions of the legislature may not be delegated by the Congress to any executive or executive department; hence, there is posed a single question for determination, to-wit: Has the Congress

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[1]12 U. S. C. A., §1464 (d): "(d) The Board shall have full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation."

[1a]Interpolation added.

made such a delegation in the sections of the Act under consideration? Fortunately the course to be followed in determining questions of this character had been well chartered by the Supreme Court of the United States. We have but to endeavor to make the proper application of the principles by said court enunciated to the conditions existing in the matter before us. We refer particularly to Panama Refining Co. v. Ryan, 293 U. S. 388, and Schechter v. U. S., 295 U. S. 495. We look to the statute to see whether the Congress has declared a policy with respect to the providing of rules and regulations for the reorganization, consolidation, merger, or liquidations of federal savings and loan associations, including the power to appoint a conservator or receiver to take charge of the affairs of any such association, and to require as equitable readjustment of the capital stock of the same; and to release any such association from such control and permit its further operation—Whether the Congress has set up a standard for the president's (board's) action; whether the Congress has required any finding by the president (board) in the exercise of the authority to do the things enumerated in Sec. 5(d) of the Act. (Panama Refining Co. v. Ryan, supra, p. 415.) It may be said of Sec. 5(d), as was said of the section involved in the Panama case, that it is 'brief and unambiguous.' It makes no attempt to lay down rules for the guidance of the board, nor does it state in what circumstances or under what conditions the board is to merge institutions or appoint a conservator or receiver. It establishes no criterion to govern the board's course. It does not require any finding by the board as a condition of its action. No policy is declared by Congress as to merger, or appointment of conservator. The section gives to the board unlimited authority to formulate rules for the board's action

in the respects mentioned and to do so as it may see fit. The only restrictions on those powers were to be such as the board might choose to put upon itself in the rules and regulations which it, the board, adopted to govern itself. We are unable to find in the Act a declaration of policy or standard of action which can be deemed to relate to the subject of section 5(d).

The Los Angeles Bank, with assets of $43,000,000 was merged with a Portland bank and later both with a bank in San Francisco. While the legality of this merger is not before us we consider it because the aim of a statute may be learned 'both from its terms and from the administrative practice under it.' Schechter v. U. S., supra. The merger was made without notice or hearing of any character. In fact, none is required by the statute and herein lies a fatal defect as to its constitutionality.[2]

We think due process requires a hearing on notice and this should be provided within the Act itself.

Comparison of the Home Owners Loan Act of 1933 as amended, under consideration here, with other acts of Congress which have been held unconstitu-

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[2] *Ohio Valley Water Co. v. Ben Avon*, 253 U. S. 287; *Coe v. Armour Fertilizer Works*, 237 U. S. 413; *Hovey v. Elliott*, 167 U. S. 409.

See also:

Boeing Air Transit Co. v. Farley, 75 F. (2d) 765.

tional because of improper delegation of legislative power, demonstrates that said Home Owners Loan Act fails to set up as comprehensive and definite statements of policy, standards, guides, criteria and limitations as do those acts.[a]

We hold Sec. 5(d) of Home Owners Loan Act of 1933, as amended, unconstitutional and void as attempting to delegate legislative power to the Federal Home Loan Bank Board created under the Federal Home Loan Bank Act.

Let judgment be entered in accordance with this opinion.

WM. E. ORR,
United States Circuit Judge.
DAVE W. LING,
United States District Judge.
PEIRSON M. HALL,
United States District Judge."

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[a] *National Industrial Recovery Act:*
Panama Refining Co. v. Ryan, 293 U. S. 388;
Schechter Poultry Co. v. U. S., 295 U. S. 495;
Bituminous Coal Conservation Act of 1935:
Carter v. Carter Coal Co., 298 U. S. 238.

See also:
Ohio Valley Water Co. v. Ben Avon, 253 U. S. 287.

Legal, Historical and Factual Background.

This primary question as to the unconstitutionality of this unlimited delegation of the legislative power by the Congress of the United States, the duly elected law-making representatives of the people arises from the following series of legislative historical facts:

The Congress of the United States by their enactment of Subsection (d) of Section 5 of the Home Owners Loan Act of 1933 (Subsection (d) of Section 1464 of the Home Owners Loan Act of 1933—Title 12—Vol. 4 F. C. A. p. 358) delegated to "the board" the unrestricted function to enact legislation regarding the appointment of conservators, without imposing any limitations whatsoever or any of the safeguards of due process, required by the Constitution of the United States. (Art. I, Sec. 1 and Art. I, Sec. 8, and par. 18, United States Constitution.)

Congress by the previously enacted Federal Home Loan Bank Act had created "the board" referred to in subsection (d) of Section 5, *supra*. (Sec. 1437, Federal Home Loan Bank Act—Title 12—Vol. 4 F. C. Annot. p. 349) and provided therein among other things:

> "Said Board shall consist of five citizens of the United States appointed by the President of the United States, by and with the advice and consent of the Senate. *Not more than three members of the Board shall be members of the same political party.* Each member shall devote his entire time to the business of the board . . . etc." (Emphasis added.) [R. 280, 281.]

This attempt, by Congress, to delegate its legislative function to "the board" was unconstitutional as the members of such a board were not elected by the people and hence were not responsive to the people.

Under our American form of democratic government, safeguarded by the Constitution of the United States, the people have at all times, retained unto themselves the control of the enactment of legislation, by which they, the citizens themselves are governed. They have done this by requiring that legislative functions be exercised only by the duly elected representatives of the people in the halls of Congress, and have thus kept their legislators promptly responsive to the people by requirement that they be reelected every two years, as to the House of Representatives, and every six years, as to Senators.

Thus, the sovereign people of the United States have endeavored by their Constitution (Amendment X) to retain unto themselves the ultimate control of the enactment of laws for governing themselves.

This is self government. This is democracy in action.

The reason, wisdom and need for the constitutional limitations, that legislative functions entrusted by the sovereign people of the United States to their duly elected representatives in Congress, cannot, and shall not be delegated to non-elective boards or persons, is exemplified by the instant case.

In this case, the attempted enactments of the Federal Home Loan Bank Administration have succeeded in changing it from a supervising agency to a totalitarian dictatorship, with an administrative policy of "Rule or Ruin".

This change was accomplished by the following enactments:

On June 13, 1933, shortly after its creation, "the board" enacted its so-called rules and regulations for federal savings and loan associations, to-wit: Section 45 thereof, which provided that under certain conditions enumerated in said Section 45:

> "The board may, on becoming satisfied of the existence of any or all of the conditions set forth above, forthwith appoint a receiver or conservator for such association and shall require such bonds, etc. . . ."

and further in the same section provided:

> *"It will not be the policy of the board, except in extra-ordinary circumstances, to exercise such power without giving the institution an opportunity to be heard."* [R. 281.] (Emphasis added.)

It is interesting to note that while there was vested in the board at that time no constitutional authority to enact such amendment, nevertheless, the board, consisting of five men, of whom not more than three could be of any one political party, attempted to provide for some semblance of due process before taking such drastic action as to seize and appoint a conservator for a federal savings and loan association.

(We regret that no Federal Register then existed; hence citations to a Federal Register are not available.)

Subsequently, and while the Federal Home Loan Bank System was still being administered by a board composed of five men, to-wit, on June 1, 1938, the said board enacted amendments regarding the appointment of conserva-

tors, and among other things endeavored to provide at least a semblance of due process as follows:

> "Sec. 2043. Conservator or Receiver . . . . (c) *Hearing. Before any appointment of a conservator or receiver, the Federal Association will be given the opportunity to be heard;* provided, however, that the board may appoint a temporary conservator pending such hearing. (Sec. 5(a), (d)." (Emphasis added.) (Sec. 51(c), Revised Rules and Regulations of Federal Rules and Regulations, effective December 1, 1936.) [R. 282.]

It should be noted that while the board probably had no constitutional authority to enact rules for the appointment of even a temporary conservator, nevertheless, the board, then composed of five men, of whom not more than three could belong to any one political party, was still maintaining a semblance of due process by providing for a hearing before seizing any such associations and appointing conservators therefor.

Thereafter, to-wit, on February 24, 1942, pursuant to the First War Powers Act of 1941, the Chief Executive issued Executive Order No. 9070, effective February 24, 1942, which provided among other things for the consolidating of the housing agency and its functions of government, into the National Housing Agency and provided that certain agencies, which included the Federal Home Loan Bank Board and its functions,

> "duties and powers, are consolidated into a National Housing Agency and shall be administered as hereinafter provided under the direction and supervision of a National Housing Administration",

and the same directive,

> "transfers all personnel in above agencies to the status created by the new agency, National Housing Administration, except as noted in 8"

which provided as follows:

> "8. The following personnel are not transferred hereunder . . . (2) the members of the Federal Home Loan Bank Board, *other than the Chairman.*" (Emphasis added.)

The effect of this Order was to make the chairman of the Federal Home Loan Bank Board, commissioner, director, and sole dictator of the Federal Home Loan Bank Administration, which function was then and ever since has been exercised by Mr. John H. Fahey, the first named defendant and an appellant herein.

Thereafter, to-wit, on January 25, 1943, the said commissioner and sole dictator, defendant-appellant John H. Fahey, *individually*, enacted further amendments dealing with the appointment of conservators, as follows:

> "Section 206. Receiver or conservator, appointment. Whenever, in the opinion of the Federal Home Loan Bank Administration, any federal savings and loan association . . . does any of the ten things enumerated in general language in said section . . . the Federal Home Loan Bank Administration (the defendant-appellant John H. Fahey as sole administrator and dictator) may *appoint a conservator for such federal association* to conserve the assets of the association pending further disposition of its affairs. *The appointment shall be by order*, which order shall state on which of the above causes the appointment is based . . .". [R. 282.] "The *conservator or re-*

ceiver shall forthwith upon appointment take possession of the association, and at the same time such conservator or receiver shall notify the officer or employee of the association, if any, who shall be in the home office of the association and appear to be in charge of such office, of the action of the Federal Home Loan Bank Administration." (Emphasis added.) [R. 283.]

NOTE: Although the term "administration" or "board" is used, actually the so-called "board" or "administration" now consisted solely of one man, defendant-appellant John H. Fahey.

Further, in the same section, the enactment by the commissioner provided:

> "If such certified copy of the order appointing the conservator or receiver is received at the offices of the association after the taking of possession by the conservator or receiver, such conservator or receiver shall hand the same to any officer or director of the association who may make demand therefor."

NOTE: Nowhere in any of the new rules and regulations enacted by the commissioner, defendant-appellant John H. Fahey, is there any provision for notice or hearing of any kind before appointment of a conservator, merger or consolidation. This enactment by defendant-appellant John H. Fahey, the commissioner and sole director of the Federal Home Loan Bank Administration, indicates that the seizure will be made and possession will be taken without, *and even before,* a certified copy of the order appointing the conservator is available.

The seizure in the instant case was made in California simultaneously with the making of the so-called "order" appointing the conservator in Washington, D. C.

Further in the same enactment by the defendant-appellant John H. Fahey, it is provided by Section 207.1:

> *"Take possession when.* Upon appointment, the conservator for a federal association shall forthwith take possession of the books, records and assets of every description of such association."

> *"Sec. 207.3. Succession.* Immediately upon the posting of the notice on the door of such federal association, as provided in paragraph (a) of Section 207.2 of these rules and regulations, the conservator shall succeed to all the rights, powers and privileges of the federal association, its officers and directors or any of them. Such officers and directors or any of them shall not thereafter have, exercise or act in connection with, any such rights, powers or privileges, or any asset or property of any nature of the association . . ."

This "pogrom" displaced from the possession and management of the said federal association, the duly elected officers, without prior notice or opportunity to be heard or any due process whatsoever.

NOTE: The Court's attention is directed to the fact that nowhere in the amendments relating to the appointment of a conservator or receiver for a federal savings and loan association and the powers and duties of such a conservator, as enacted by the defendant-appellant John H. Fahey, as commissioner and sole director, is there any provision or allowance whatsoever made for a hearing before any court, or at all, or for due process of any kind

BEFORE the seizure of such associations by a purported conservator. [R. 283.] (Amendments of Jan. 25, 1943—recorded 8 Fed. Reg. 1180 Wed., Jan. 27, 1943.)

No hearing may be had at any time unless requested by dispossessed officers, and then only before a self-serving prejudiced tribunal, and shareholder members are not at any time afforded an opportunity for a hearing before an impartial tribunal. [R. 283.] (Sec. 206.1 of Part IV, amended Jan. 27, 1943.)

By Bulletin 59 dated May 20, 1946, filed May 20, 1946, at 11:15 A. M. in Washington, D. C., to-wit: 8:15 A. M. of May 20, 1946, Pacific Standard time of Long Beach, California, which was literally simultaneous with the seizure of the solvent Long Beach Federal Savings and Loan Association by the purported conservator, the defendant-appellant A. V. Ammann, there was issued by the commissioner a bulletin amending Section 207.11 as follows, to-wit:

> "*Authority of Officers.* Any authority or requirement under Sections 207.5 to 207.10 for action, by order or otherwise, by the Federal Home Loan Bank Administration, or by the Governor, a Deputy Governor or an Assistant Governor, *may be performed by the Governor, a Deputy Governor*, or an *Assistant Governor*. Without any limitation on the applicability of this section to other conservatorships, *this section shall apply to any conservatorship existing at the time of the amendment affected by the adoption of this section, and to the conduct of and procedure under any conservatorship so existing.*" (Emphasis added.) (Sec. 5(a), (d) of H. O. L. A. of 1933, 48 Stats. 132, 133; 12 U. S. C. 1464(a) (d), E. O. 9070, 7 F. R. 1529.)

The above enactment No. 207.11 was obviously adopted in the attempt to delegate to Mr. Lee, a then governor, the authority which he would not otherwise have had, that is to make the order which he was then *simultaneously* making, purportedly appointing the defendant-appellant A. V. Ammann.

Even after the seizure in the instant action of the financially healthy Long Beach Federal Savings and Loan Association and the appointment of a purported conservator therefor, and without any prior notice, hearing or opportunity to be heard, to wit: without any semblance of due process, an attempt was made by the defendant appellant John H. Fahey, commissioner and sole director of the Federal Home Loan Bank Administration to further delegate the unlimited legislative function, to-wit: Bull. 61, dated June 6, 1940, Section 207.12:

> "*Delegation by Conservator.* The conservator may delegate to such persons as he may designate any or all of the powers and authorities vested in the conservator by or under sections 207.3, 207.5, 207.6 and 207.7. Without any limitation on the applicability of this section to other conservatorships, this section shall apply to any conservatorship existing at the time of the amendment effected by the adoption of this section, and to the conduct of any procedure under any conservatorship so existing.". Sec. 5(a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464(a), (d); E. O. 9070, 7 F. R. (1529).

The power of legislative enactment entrusted by the sovereign people of the United States of America, to their duly elected representatives in Congress, and whom, they, the people, can hold accountable at regular intervals through the instrumentality of the ballot box, the hand maiden of our representative form of democratic government, has been delegated, contrary to the provisions of Article I, Section 1, and Article I, Section 8, paragraph XVIII, of the Constitution of the United States to; first a non-political five man board, which at least endeavored by its enactments, unconstitutional though they may have been, to maintain some semblance of due process before seizure, and thereafter by successive steps, the legislative function, a principal element of sovereignty, passed without restriction, to the hands of a one man dictator, who, by his enactments, removed even the semblance of due process before seizure, and in turn, again even attempted to delegate without limitation, the sovereign right of enactment of legislation, to various governors, deputy governors, and assistant governors, and finally he further attempted to delegate the function of legislation so that even the conservator could further delegate this sovereign power

> "to such persons as *he* may designate". (emphasis added)

to-wit: even to persons unknown.

So long as the sovereign power of legislative enactment, even though, unconstitutionally delegated, remains in the

hands of benevolent dictators, the dangers thereof might not be, at first, apparent; however, when this sovereign power of legislative enactment falls into the hands of an adamant dictator who, for the National System of Federal Savings and Loan Associations, adopts a policy of so-called supervision which has for its watchword the cry of "rule or ruin", then the vicious dangers to our representative democratic form of government become quickly apparent, even as in the instant case.

The manner in which acts of an administrative officer functions under an enactment is of assistance in interpreting the scope of such enactment, as his acts disclose the interpretation placed upon such enactment by the official administering thereunder.

In *Schechter Poultry Co. v. U. S.*, 295 U. S. 495, the rule was enunciated by Mr. Justice Cardozo at page 551:

> "This court has held that delegation may be unlawful though the act to be performed is definite and single, if the necessity, time and occasion of performance have been left in the end to the discretion of the delegate."

and at page 553:

> "This is delegation running riot. No such plenitude of power is susceptible of transfer. The statute, however, aims at nothing less as one can learn both from its terms and *from the administrative practice under it.*" (Emphasis added.)

Also see *Yick Wo v. Hopkins*, 118 U. S. 356 (1886), quoted with approval as recently as this year in the con-

curring opinion of Mr. Justice Frankfurther in *U. S. v. United Mine Workers*, 91 L. Ed. Adv. 595.

The unreserved delegation of unrestricted authority, away from the elected representatives of the people into the hands of a nonelected individual produces the hallmark of dictatorship:

Unlimited Power concentrated in one person.

The acts of the defendant-appellants A. V. Ammann and John H. Fahey in the instant case clearly disclose, that in their opinion at least, the delegation of legislative authority by Section 5(d) of the Home Owners Loan Act of 1933 as amended, was complete and unreserved, and constituted a grant to the commissioner, defendant- appellant John H. Fahey, of unlimited power—"a roving commission to inquire into evils (even imaginary) and upon discovering them, to do anything he pleases to correct them" in accordance with what *he*, in his omnipotent judgment might deem desirable.

Mr. Justice Cardozo stated that such delegation of unlimited legislative authority was repugnant to the Constitution, expressing the rule in graphic language in the case of *A. L. A. Schechter Poultry Corporation v. United States*, *supra*, as follows:

> There can be "no grant to the executive of any roving commission to inquire into evils and then, upon discovering them, to do anything he pleases" to correct them. (p. 551).

Facts.

In the instant case the verified pleadings and affidavits of the appellees have generally not been denied except in some minor particulars and therefore stand generally admitted, and the trial court has found to be true, as mostly admitted, the facts which raised the question of unconstitutionality and required the issuance of injunctions, to be, that:

On May 20, 1946, the defendant-appellant A. V. Ammann, with the assistance of numerous other persons, seized possession of the solvent Long Beach Federal Savings and Loan Association, in Long Beach, and all of its then assets, which then exceeded twenty-six millions of dollars ($26,000,000.00). [Aff. Mallonee, R. 25, *admitted* by Aff. Ammann, R. 296, Findings I, II, R. 493].

The seizure was accomplished by the defendant-appellant A. V. Ammann without any prior notice, or hearing of any kind whatsoever, and he only orally claimed to have been authorized by this co-defendant-appellant, Mr. Commissioner John H. Fahey, hereinafter referred to as "defendant-appellant Fahey" [Admitted by Affs. of Ammann, R. 296 and 297; Findings II, V, VI, R. 493 and 494.]

It was only after some insistence by the officers of the Long Beach Federal Savings and Loan Association that the defendant-appellant, A. V. Ammann, produced a typewritten *unsigned* so-called order, which he then and there proceeded to certify himself, as assistant secretary of the Federal Home Loan Bank Administration, claiming that the said order had been issued in Washington the preceding day and had been read to him over the

telephone. [Aff. T. A. Gregory, R. 284 and admitted by Aff. A. V. Ammann, R. 297.]

It was further claimed by the defendant-appellant, A. V. Ammann,

> "that the immediate effect of this action was to relieve the officers and directors of all authority and that it places the conservator in their stead." [Aff. Ammann, R. 296.]

At the time of the seizure the Long Beach Federal Savings and Loan Association was an organization which had grown in the preceding twelve years under the management of substantially the same officers and directors from a seventy-five hundred dollar ($7,500) institution in 1934 to a twenty-six million dollars ($26,000,000.00) financial institution in 1946 [R. 120-121] and had continuously during this entire period, payed dividends of two and a half to four per cent (2½% to 4%) per annum [R. 284]. At the time of the seizure it admittedly had a surplus and undivided profits of over a million dollars, to-wit: approximately one million three hundred thousand dollars ($1,300,000.00). [Finding I, R. 120-121.]

Subdivision (a) of Section 5 of the Home Owners Loan Act of 1933, as amended, provides for the organization of *local thrift associations* for the financing of homes, "under such rules and regulations as it (the Board) may prescribe". In 1934 the Long Beach Federal Savings and Loan Association was organized thereunder. It should be noted that this Subdivision (a) of Section 5 is not the subdivision declared unconstitutional by the statutory three-judge court. It was Subdivision (d) of Section 5 that delegates unlimited legislative authority, to enact

"rules and regulations" for the "reorganization, consolidation, merger, or liquidation of such associations"—which was so declared to be unconstitutional.

Subdivision (d) of Section 5 of the Home Owners Loan Act of 1933, as amended, is here under consideration as unconstitutional—not Subdivision (a)—as might be inferred from A. B. 5.

The Association was *not* supported or financed in anyway by any governmental money whatsoever, but its entire capital and deposits then consisted solely of the mutual savings of approximately 16,000 of its shareholder members. [Undenied Aff. T. A. Gregory, R. 285.]

On May 20, when seized said Long Beach Federal Savings and Loan Association had approximately twelve million of dollars ($12,000,000.00) in government bonds, a part of which were unregistered, bearer bonds, negotiable without endorsement. The Long Beach Federal Savings and Loan Association also had approximately 8,000 secured notes with unpaid balances aggregating approximately twelve millions of dollars ($12,000,000.00), all of which notes had been made by residents of southern California, to the Long Beach Federal Savings and Loan Association, a mutual association, having its legal domicile in Long Beach, in southern California and its main office in Long Beach, and all such notes were secured by trust deed which conveyed the title to approximately eight thousand (8,000) parcels of real estate in southern California to the Title Service Company, a California corporation, likewise having its legal domicile in Long Beach, California, as trustee for the benefit of the Long Beach Federal Savings and Loan Association. [Undenied Aff. Roberts, R. 135.]

All of the assets of the said Long Beach Federal Savings and Loan Association, including both real and personal property were physically present in southern California. [Undenied Aff. Gregory, R. 285.]

At the time of the seizure there was physically present in the office of the Long Beach Federal Savings and Loan Association, cash and unregistered bearer bonds, negotiable without endorsement, amounting in the aggregate to approximately $1,000,000.00 which belonged to the Long Beach Federal Savings and Loan Association, and there was additional cash and other securities, resulting from collections for other persons. The exact amounts of these items are still unknown to the plaintiffs for the reason that though repeatedly requested so to do, the defendant-appellant A. V. Ammann, at the time of the seizure, refused to, declined to and did not, give to the officers or directors of the Long Beach Federal Savings and Loan Association or to any other person, any receipt, acknowledgement, inventory or other evidence or list of the amount of cash, bearer bonds, securities, negotiable bonds, valuables or other property which at the time were physically seized and taken from the possession of the officers and directors of the Long Beach Federal Savings and Loan Association, and, since such seizure, the said defendant-appellant A. V. Ammann has continuously and steadfastly thereafter declined to and refused to and did not give to the plaintiffs any such inventory, receipt, acknowledgment or other listing of the negotiable property

so seized until approximately four and a half months thereafter, to wit, not until November 6, 1946. [Undenied Aff. T. A. Gregory, 285, and Aff. T. A. Gregory, R. 120.]

That at the time of the seizure requests were made of the defendant-appellant A. V. Ammann, that certified public accountants, the auditors for said Long Beach Federal Savings and Loan Association, who were then personally present, be permitted to make an itemized list of the assets, cash securities and properties then being seized from said Long Beach Federal Savings and Loan Association, but the defendant-appellant A. V. Ammann, refused and declined to permit any one to make any such lists, receipts or detailed accounting of the moneys, securities, bonds and valuables then being seized, and a few minutes after said seizure, without having made any inventory or account listing, the negotiable assets and cash seized, the defendant-appellant A. V. Ammann admitted reopened the offices of said Long Beach Federal Savings and Loan Association to the general public and started disbursing to the general public the money so seized. [Undenied Aff. Gregory, R. 129, and Keith Linden, R. 71.]

Because of the arbitrary acts of the defendant-appellant A. V. Ammann in refusing to permit the taking of an inventory these plaintiffs still do not know, and may never be able to obtain a true and correct accounting of the millions of assets seized except such as the defendant-appellants A. V. Ammann and John H. Fahey cares to admit seizing.

The so-called order No. 5254 [R. 219-220][4] which the defendant-appellants A. V. Ammann and John H. Fahey refer to at (A. B. 6) but fail to reproduce, is almost a

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[4] Whereas, it has been determined that the Long Beach Federal Savings and Loan Association, Long Beach, California:

is conducting its business in an unlawful manner;

is conducting its business in an unauthorized manner;

is conducting its business in an unsafe manner;

has a management which is unsafe to manage a Federal Savings and Loan Association;

has a management which is unfit to manage a Federal Savings and Loan Association;

is pursuing a course that is jeopardizing the interests of its members;

is pursuing a course that is jeopardizing the interests of its creditors;

is pursuing a course that is jeopardizing the interests of the public;

is pursuing a course that is injurious to the interests of its members;

is pursuing a course that is injurious to the interest of its creditors; and

is pursuing a course that is injurious to the interests of the public; and

Whereas, it has been determined to be in the interest of said association, its members, creditors, and the public to appoint a conservator to take possession of said association and to conserve its assets pending further disposition of said association and its affairs:

Now, therefore, A. V. Ammann is hereby appointed Conservator for the Long Beach Federal Savings and Loan Association, Long Beach, California, to take possession of said association and to conserve its assets pending further disposition of said association and its affairs; and, as such Conservator, to have and exercise all the powers and rights, enjoy all the privileges, and assume and perform all the duties and responsibilities of his office accorded or imposed by law, the Rules and Regulations for the Federal Savings and Loan System, and order issued by the Federal Home Loan Bank Administration, or otherwise.

I hereby certify that the above is an order issued by the Federal Home Loan Bank Administration on May 20, 1940.

A. V. AMMANN,
Assistant Secretary.

verbatim reproduction of their own so-called rule No. 206.1 [A. B. 111 Appendix] and is a list of legal conclusions only.

Yet defendant-appellants A. V. Ammann and John H. Fahey claim that this conclusion order was issued on the grounds

> "that it had been determined that the Association was *conducting* its business in an *unlawful, unauthorized,* and unsafe manner; that it had a *management* which *was unsafe* and *unfit* to manage a federal savings and loan association and that it was pursuing a course that was *jeopardizing* and injurious to the interest of its members, its creditors and the public" (A. B. 6). (Emphasis added.)

This same *unsafe* and *unfit* management, first complained of on the day of seizure had been for twelve years, with bi-annual examination by the administration, conducting the business of the Long Beach Federal Savings and Loan Association in such manner that the Long Beach Federal Savings and Loan Association had *continuously* paid dividends of 2½% to 4% to all of its shareholder members and still had a net surplus and undivided profits admittedly of more than $1,300,000.00.

Was the course of management which produced net profits of $1,300,000.00 "injurious to the interests of the members"—did it "jeopardize any of their interests" or was this same management which in twelve years built the Long Beach Federal Savings and Loan Association from a beginning of only $7500 into a $26,000,000.00 institution, "unsafe" and "unfit"—or was the management conducting "its business in an unlawful, unauthorized, or

unsafe manner, because of the dividends it had paid or the surplus this management had earned?

Was the business being conducted in an unsafe or unlawful manner because it had paid dividends continuously for twelve years?

Was the conduct of the business "unauthorized" because of the semi-annual audits being made by the Administration?

The defendant-appellants A. V. Ammann and John H. Fahey say

> "that it had been *determined* that the Long Beach Federal Savings and Loan Association was committing all of these 'heinous crimes'."

This so-called prior "determination" of all of these heinous things the defendant Long Beach Federal Savings and Loan Association and all of its officers were doing was made by whom? When? *On what testimony? Given by what witnesses at what hearing? Held* up on what notice? How were they examined? By whom? Not by the Long Beach Federal Savings and Loan Association.

Was the Association first chartered by the so-called "Bank Administration" "unlawful" or "unauthorized" because it had been so chartered or authorized by the Los Angeles Bank Administration? Did this all constitute "due" process?

Under the management of these defendant-appellants John H. Fahey and A. V. Ammann, as the socalled conservator Long Beach Federal Savings and Loan, the Association has lost nearly ten million dollars ($10,000,000.00) in shareholder member earnings deposits [R. 392] has increased its overhead [R. 395] has discharged

all of the loyal former employees who had been with the Long Beach Federal Savings and Loan Association for years.

Is this conducting the business in a "*safe* manner?"

By their unconstitutional acts are the defendant-appellants conducting the business in a "lawful" and "authorized" manner?

Are the defendant-appellants pursuing a course that does *not* jeopardize the Long Beach Federal Savings and Loan Association by the discharge of all of the loyal employees of the Long Beach Federal Savings and Loan Association?

Is the conduct of the defendant-appellants in losing ten million dollars ($10,000,000.00) of shareholder members savings deposits for the best "interest" of the members of the Long Beach Federal Savings and Loan Association?

—of its creditors?

—of the public?

Was the increase in overhead of the Long Beach Federal Savings and Loan Association by some seventeen thousand dollars ($17,000.00) in forty days, *i. e*, four hundred and twenty-five dollars ($425.00) per day [R. 395] for the best interests of the Long Beach Federal Savings and Loan Association members?

Is the conduct of the defendant-appellants in cancelling trust deeds and notes by having the signatures torn off so that titles can only be cleared by extensive litigation "safe" for the Long Beach Federal Savings and Loan Association [R. 399 and 408 and Admission of Ammann R. 409].

Was the act of the defendant-appellant A. V. Ammann in investing some two hundred sixty-six thousand seven

hundred dollars ($266,700.00) of the Long Beach Federal Savings and Loan Association's funds in the Federal Home Loan Bank of San Francisco the validity of whose existence was and is in litigation safe? [R. 395.]

Was the unauthorized exchange of the stock belonging to the Long Beach Federal Savings and Loan Association in the Federal Home Loan Bank of Los Angeles which then had a face value of three hundred forty-one thousand seven hundred ($341,700.00) plus an undivided interest in the earned profits of over forty thousand ($40,000) for stock in the Federal Home Loan Bank of San Francisco having an unknown value, and whose very existence was being litigated safe? [R. 395.]

Is this course of conduct of the defendant-appellant A. V. Ammann, the purported conservator approved as management to be safe and fit?

The seizure of the Long Beach Federal Savings and Loan Association by the defendant-appellants A. V. Ammann and John H. Fahey caused a run on the Long Beach Federal Savings and Loan Association, which resulted in the withdrawals from the Long Beach Federal Savings and Loan Association, within fifty (50) days, to wit, before July 10, 1946, of more than eight million dollars ($8,000,000.00), and before decision of the trial court on September 5, 1946, had resulted in the withdrawal of approximately ten million dollars ($10,000,000.00) over a third of its assets. [Undenied Affs. of Gregory, R. 286 and Affidavit of L. D. White filed in Supreme Court in Support of Motion to Vacate Order Staying Execution of Decree of Statutory Three Judge Court.]

That for the first forty (40) days of operation of said Long Beach Federal Savings and Loan Association, the so-called conservator, the defendant-appellant A. V. Ammann, appropriated for salaries, expenses and costs for himself and his associates from the funds of the said Long Beach Federal Savings and Loan Association, the sum of approximately seventeen thousand dollars ($17,000.00), over and above the expenses and salaries then being paid the legitimate employees of the Long Beach Federal Savings and Loan Association [Undenied Aff. of T. A. Gregory, R. 286 and Undenied Affidavit of Wm. C. MacArthur, R. 395].

The fears of the duly elected officers and directors of the Long Beach Federal Savings and Loan Association, that the defendant-appellants John H. Fahey and Ammann would liquidate, dissolve, transfer, merge or consolidate the said Long Beach Federal Savings and Loan Association with some other unknown association or institution and thus commingle and transmute its assets and funds so as to make it impossible to unscramble them, arose from the fact that the defendant-appellant John H. Fahey, acting through his associates, had on March 29, 1946, seized the admittedly solvent Los Angeles Federal Home Loan Bank and its approximately forty-three million dollars ($43,000,000.00) of assets and on the same day, liquidated, dissolved, merged, consolidated and commingled it and all of its assets with the approximately nine million dollars ($9,000,000.00) of assets of the Federal Home Loan Bank of Portland, and then on the same day, from the commingled assets of both banks, by his fiat created the so-called Federal Home Loan Bank of San Francisco [Admitted by Affidavit of Dougherty, R. 291].

The Long Beach Federal Savings and Loan Association owned stock in the Federal Home Loan Bank of Los Angeles at the time of its seizure, which had a par value of three hundred and forty-one thousand dollars ($341,000.00) and in addition the Long Beach Federal Savings and Loan Association was entitled to its *pro rata* interest in the undivided profits of nearly two million dollars ($2,000,000.00) of the Federal Home Loan Bank of Los Angeles which and an additional value of approximately forty thousand dollars ($40,000.00). All of the interest of the Long Beach Federal Savings and Loan Association in the Federal Home Loan Bank of Los Angeles was then and there confiscated and by virtue of the alleged unconstitutional fiats heretofore set forth (Sec. 207.3 of Rules and Regulations, as amended 1-27-43 (8 F. R. 1180)) the defendant-appellant John H. Fahey attempted to suspend the duly elected officers and directors of the Long Beach Federal Savings and Loan Association and to deprive them of all authority to exercise or act in connection with any of their rights, powers or privileges or to deal with any assets or property of any nature of the said association and from bringing appropriate legal action in the courts to protect the Long Beach Federal Savings and Loan Association and to recover its assets [Undenied Affidavit of T. A. Gregory, R. 287-288].

The Seizure of the Long Beach Federal Savings and Loan Association and its assets by the defendant-appellants A. V. Ammann and John H. Fahey, has placed a cloud or lien upon and has entangled the titles to approximately eight thousand parcels of real property in southern California. As a result thereof, a petition in interpleader and a bill in the nature of interpleader and various and

numerous petitions for intervention have had to be filed for the purpose of clearing the title to some two hundred (200) parcels of real property in southern California, and petitions for intervention are still constantly being filed in efforts to clear the title to additional parcels of southern California real estate [R. 319, Title Service Interpleader [R. 30], Home Investment Intervention [R. 247], O'Rourke Intervention [R. 486 and many others not included in the record on appeal].

On June 5, 1946, order No. 5309 of the Federal Home Loan Bank Administration was issued providing for a hearing on July 3, 1946, to be held before a hearing officer in Los Angeles [R. 94-96]. According to the order the Long Beach Federal Savings and Loan Association was authorized to appear and show cause why the conservator should not have been appointed and why an order should be entered by the administration discharging the conservator [R. 95]. The order provided that others could file a petition for leave to intervene if they wished [R. 95]. The order expressly provided that the hearing officer "shall not have power to decide any motion to dismiss the proceedings or other motion that involves final determination of the ultimate issue; . . . . but shall not have power to determine the ultimate issue; . . . ." [R. 95-96]. The order then provided that the hearing officer should send a complete transcript to the secretary of the Federal Home Loan Bank Administration, that is, the defendant-appellant Fahey's secretary.

On June 20, 1946, the plaintiff appellees filed in the district court their motion for a preliminary injunction to restrain this administrative hearing [R. 100-103]. This motion was based upon the assertions that the defendant-

appellant Fahey had no jurisdiction to conduct such a hearing, as the act under which defendant-appellant Fahey purported to order such hearing was unconstitutional and because the hearing would not be conducted in a fair and proper forum, and, as the defendant-appellant Fahey would be passing upon and adjudicating and determining the propriety and validity of his own acts, which he had already demonstrated were influenced by bias and prejudice and had been prejudged [R. 101], it was further alleged in the motion that such a hearing would damage the good will of the Long Beach Federal Savings and Loan Association, and the resultant publicity might start another "run" of withdrawals which might even exceed the previous run caused by the seizure at which time $6,000,000.00 had been withdrawn within a comparatively short time [R. 102]. This motion was supported by extensive affidavits [R. 104-124].

The defendant-appellant Title Service Company made a similar motion [R. 129-133] supported by a group of affidavits [R. 134-176]. The plaintiff-appellees on July 1, 1946, filed a motion for temporary restraining order [R. 236-239], supported by affidavit [R. 240-243], raising the additional point that at such an administrative hearing questions involving the constitutionality of the rules and regulations and acts under which the conservator was allegedly appointed [R. 238], and that, as such, an administrative hearing paralleling this action would constitute a multiplicity of the actions and be an encroachment on the jurisdiction of the district court.

The motion to restrain the administrative hearing was granted on July 1, 1946 [R. 244-245], and is still in effect through the adoption of the restraint in the decree of the

three judge court [R. 489-500], unless the order of this court staying execution of the decree [R. 506] has deprived the plaintiff-appellees of that protection.

After the statutory court had rendered its unanimious opinion holding Section 5(d) of the Home Owners Loan Act of 1933, as amended, unconstitutional, and ordering judgment to be entered in accordance therewith, findings of facts, conclusions of law and the decree herein were prepared and presented to all counsel also to the court and counsel for defendant-appellants A. V. Ammann and John H. Fahey objected thereto [R. 424].

In an endeavor to stop further depletion of the assets of the Long Beach Federal Savings and Loan Association, appellees joined in a motion for a temporary restraining order and preliminary injunction to prevent the appellants from interfering with the duly elected directors and officers in the proper management and operation of the Long Beach Federal Savings and Loan Association—which, if granted would have restored the Long Beach Federal Savings and Loan Association to its duly elected and proper management [R. 390].

Their motion was supported by numerous undenied affidavits [R. 386-424] showing irreparable injury being done the Long Beach Federal Savings and Loan Association [R. 756-757].

The defendant-appellants A. V. Ammann and John H. Fahey objected to the motion most strenuously, claiming the motion was in effect a request for an order of restoration of the management to the possession and control of the Long Beach Federal Savings and Loan Association and its assets, and that the single judge of the district court was without jurisdiction to hear and determine the

matters as it was an issue included within the opinion of the three judge statutory court [R. 756-757].

After an extended argument [R. 710-760] the district court adopted the theory advanced by counsel for the defendant-appellants A. V. Ammann and John H. Fahey and declined to issue its temporary restraining order and carefully based the denial of the motion upon lack of jurisdiction over a subject which had been heard and was then pending before the statutory three-judge court [R. 758].

Since substantially the same matters were contained in the decree which was subsequently entered [Decree Items 7, 8, 9, 10; R. 497-499] the plaintiff-appellees yielded to the reasoning advanced by the defendant-appellants A. V. Ammann and John H. Fahey and adopted by the one judge of the district court and took no appeal from his decision.

It would seem that this should have ended the dispute as to how broad the decree should be following a holding that Section 5(d) of the Home Owners Loan Act of 1933, as amended, was unconstitutional.

But apparently the defendant-appellants A. V. Ammann and John H. Fahey now want this court to adopt a different theory and to hold that the decree is too broad.

It appears that the defendant-appellants A. V. Ammann and John H. Fahey are inconsistent—to say the least.

The plaintiffs here constitute a Shareholder Members Protective Committee, suing as representatives of all

share holder members in the Long Beach Federal Savings and Loan Association [R. 1 and 4, Finding III; R. 494].

The defendant-appellant John H. Fahey was duly and regularly served with process and is a proper party defendant [Finding VIII, R. 495; Order, R. 45 and 46].

The only color of authority of the defendant-appellant A. V. Ammann, if any, to act as conservator must be bottomed on sub-section (d) of paragraph 5 of the Home Owners Loan Act of 1933, as amended [Finding VII, R. 494, 495; and Opinion, R. 375, 376].

The Home Owners Loan Act of 1933, as amended, when compared with other acts of Congress which have been held unconstitutional because of an attempt to delegate unlimited legislative authority, discloses that the said Home Owners Loan Act of 1933, as amended, fails to set up even as comprehensive or definite statements of policy, standards, guides, criteria or limitations as did such other enactments of Congress heretofore held to be unconstitutional by this court. Hence Section 5(d) of the Home Owners Loan Act of 1933, as amended, is unstitutional and void on the ground that it attempts to delegate unlimited legislative power to non-elective persons or boards [Opinion, R. 378].

From these simple facts, it is obvious that the defendant-appellants A. V. Ammann and John H. Fahey, appellants here, have shown by their acts that they considered the delegation of legislative authority under the provisions of Section 5(d) of the Federal Home Owners Loan Act

of 1933, as amended, to have been complete and unlimited, and to have vested them with absolute and unrestrained dictatorial powers, to have constituted a grant to them of a roving commission to inquire into evils, even imaginary, in solvent financial institutions and to take any action they might see fit, without formal order, notice, hearing or proceeding or due process of any kind whatsoever, even to the seizure, and reorganization, consolidation, merger, or liquidation of such mutual associations.

The statutory three judge trial court directed its attention primarily to the question of whether or not Section 5(d) of the Home Owners Loan Act of 1933, as amended, improperly delegates legislative power and is therefore unconstitutional. The only authority, if any there be, on which the acts cited herein can be justified, must be bottomed on sub-section (d) of Section 5 of the Home Owners Loan Act of 1933, as amended. It is on the direct operation of this statute that the defendant-appellants A. V. Ammann and John H. Fahey must rely. [Opinion, R. 375.]

The determination of this constitutional question is therefore, the only question of substantive law here involved (A. B. 2-3) and its determination would, of course, become the law of the case. If the unconstitutionality of this section is affirmed, other substantive questions in the cross-actions and interventions would be easily and quickly determinable, as, if the said Section 5(d) is unconstitutional, then the so-called Rules and Regulations

promulgated by the defendant-appellant John H. Fahey thereunder do not have constitutional support and are of no force and effect, and the so-called order purportedly appointing the defendant-appellant A. V. Ammann conservator is an unauthorized order and is void *ab initio*, leaving the defendant-appellant A. V. Ammann as a trespasser and interloper in the affairs of the Long Beach Federal Savings and Loan Association.

This position is substantiated by the fact that

> "an unconstitutional act is not a law; it confers no right; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as inoperative as though it had never been passed."
>
> *Norton v. Shelby Co.*, 118 U. S. 425.

it gives no rights and no powers of authority, and this conclusion is true irrespective of the pleas advanced by the defendant-appellant trespassers to distract the court's attention, such as pleas of estoppel, pleas that administrative remedies must first be pursued, pleas that the action should have been commenced in some jurisdiction other than that in which is situated the real property, title to which has been clouded, pleas as to who are or are not indispensable parties, or pleas that judgment cannot be entered without another, though useless, hearing.

All such pleas serve the purpose of abating the action only; they are not pleas in bar. Such pleas assert that a different form of procedure should have been followed,

instead of advancing some real defense to the substance of the litigation; they further serve only to distract the court's attention from the main important determinative issue—that of constitutional law.

The constitutionality of Section 5(d) here involved is not determined by whether or not the action was commenced in California or in Washington, D. C., nor is the constitutionality of the Section 5(d) affected by whether or not the defendant-appellant John H. Fahey was served personally in California, or was served under the court's order for service upon an absent defendant in Washington, D. C. Likewise the constitutionality of Section 5(d) is not affected by the answer to the question of whether or not the action was commenced by a so-called administrative hearing before a prejudiced tribunal which had prejudged the matter, or by whether it was or was not commenced in a regular duly constituted impartial United States statutory court of law and charged with the special duty of determining the constitutionality of acts of Congress. Constitutional law still exists and requires obedience to it, irrespective of such contentions; it is fundamental. Can this court feel that the determination of an administrative tribunal, appointed by and subservient to the defendant-appellant John H. Fahey, would affect or influence the decision of the District Court or of this court?

Even should defendant-appellants A. V. Ammann and John H. Fahey succeed in diverting this Honorable

Court's attention from the main issue, ultimately, either in this or in subsequent litigation, the constitutionality of Section 5(d) of the Home Owners Loan Act of 1933 as amended must be determined by this court. We suggest now is the time and here, the place.

Should the appellants succeed in their efforts to draw this court's attention away from the principal issue involved herein, that of constitutional law, into the determination of collateral secondary questions, the principal result would be that the defendant-appellants A. V. Ammann and John H. Fahey might succeed in retaining possession of the Long Beach Federal Savings and Loan Association and its assets as interloper trespassers for a substantial period of time, pending future litigation, which would thereby be made necessary in order to again raise and present to this Honorable Court the question of the unconstitutionality of Section 5(d).

The other result would probably be a further dissipation of assets. By that time there might well not be anything left for the conservator to conserve.

The defendant-appellants A. V. Ammann and John H. Fahey ask that this court require these respondents to seek a tortuous path rather than a direct road to the door of this court, where a final decision as to the unconstitutionality of this section may be made.

We therefore direct this court's attention first to the primary question of the unconstitutionality of Section 5(d) of the Home Owners Loan Act of 1933, as amended.

Argument.

Section 5(d) of the Home Owners Loan Act of 1933, as amended, the unconstitutionality of which is here under consideration, is as follows:

> "The Board shall have full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such associations including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require a equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation." (Sec. 1464(d), Title 12, U. S. C., 4 F. C. A. 358.)

Plan of Argument.

Consideration on this appeal falls into three main classifications:

A.

Consideration of the unconstitutionality of Section 5(d) of the Home Owners Loan Act of 1933, *supra*.

B.

Numerous and various collateral procedural and jurisdictional questions attempted to be raised by the defendant appellants in an effort to divert this Honorable Court from passing upon and determining the unconstitutionality of the said Section 5(d) of the Home Owners Loan Act of 1933, *supra*.

C.

Severability: The Home Owners Loan Act is severable, both by specific provisions of the Act itself (Section 1468, Title 12, F. C. A. 361) and by virtue of prior decision of this Court. (*Hopkins Savings and Loan Association v. Cleary*, 296 U. S. 315, 335 (1935).)

Argument A.

Delegation of Legislative Functions Is Unconstitutional.

Section 5(d) of the Home Owners Loan Act of 1933, as amended, is unconstitutional.

I.

An Enactment Which Delegates the Unlimited Power to Make Laws Is Unconstitutional.

(a) Section 5(d) of the H.O.L.A. of 1933 as Amended (Sec. 1464(d) Title 12, U. S. C. Attempts to Delegate the Legislative Functions Reserved to Congress Without Providing Either Adequate or Any Statement of Policy, Standards, Limitations, or Criteria, to Guide the Administrator in Exercising Such Legislative Functions, All of Which Is Repugnant to Article I, Sec. 1, and Article I, Sec. 8, Paragraph 18 of the Constitution of the United States of America, and Contravenes Section 1 of the Tenth (Xth) Amendment to the Constitution of the United States.

"Section 1. All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives." (Article I, Sec. 1, Constitution of the United States.)

2. The power to make necessary laws is specifically included in the specific powers granted to Congress by virtue of the Constitution, as follows:

"18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States or

in any department or officer thereof." (Paragraph 18 of Section 8 of Article I.)

3. All other powers not specifically delegated to the federal government are reserved to the states or to the people themselves as specifically provided as follows:

"Section 1. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." (Sec. 1 of the 10th Amendment.)

From a reading of these sections of the Constitution and the Amendments it is readily apparent that the sole and exclusive power and authority for making of laws for the government of the people generally throughout the United States is vested in Congress and may not be delegated by Congress to any executive, administrative officer, board or commission, without prescribing a definite policy, standard or rule for their guidance in putting into effect and operation by administrative rules, the laws enacted by the Congress of the United States.

(b) Unrestrained Delegation of the Legislative Function Has Been Declared as Repugnant to the United States Constitution by Long Line of Decisions of this Honorable Court.

The function of the legislature may not be delegated by the Congress to the executive department or to any executive, administrative officer, board or commission without prescribing a policy, standard or rule for their guidance and the act must not vest them with an arbitrary or un-

controlled discretion with regard thereto, as to matters or persons to which the statute shall be applied.

Panama Refining Co. v. Ryan, 293 U. S. 388 (Jan. 7, 1935).

The Supreme Court there held that Section 9(c)—(Hot Oil Section)—of the National Industrial Recovery Act and the orders of the President of the United States made pursuant thereto, were unconstitutional and reversed the lower court's decision and remanded the case with directions to grant a permanent injunction, restraining the United States officers from enforcing the orders and regulations made under the Hot Oil Section, and the court stated (p. 421):

> "The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested." (Art. I, Sec. 1, and Art. I, Sec. 8, Par. 18, of the Constitution of the United States.).

A. L. A. Schechter Poultry Corp. v. U. S., 295 U. S. 495.

The Supreme Court declared that the National Industry Recovery Act, in its entirety, was unconstitutional as the attempted delegation of legislative power was repugnant to the Constitution of the United States and in the decision stated:

> "In so far as it purports to confer upon the President the authority to adopt and make effective codes of fair competition." (A form of rules and regulations. (p. 541.) "The Constitution provides that all Legislative powers herein granted shall be vested in a Congress of the United States, which shall consist

of a House of Representatives and a Senate. (p. 529.) Art. I, Section 1 'and the Congress is authorized to make all laws, which are necessary and proper in carrying into execution' its general powers." (p. 529.) (Art. I, Sec. 8, Par. 18.) "The Congress is not permitted to abdicate or transfer to others the legislative functions with which it is thus invested." (p. 529.)

Butler v. U. S., 296 U. S. 561 (1936).

Declared the Agriculture Adjustment Act (U. S. C., Sections 608 and 609) unconstitutional because of the attempted improper delegation of legislative powers of the Secretary of Agriculture without a sufficient statement of standards and policies. (See p. 7.) The provisions of the sections involved are quoted on pages 3 and 4 of the decision in *Butler v. U. S.*; 78 F. (2d) 1, at 3 and 4.

> "*The Powers to determine what the law shall be, what property shall be affected by taxation or regulation and what standards shall govern the administrative officers in administering acts of Congress has never been held to be an administrative function.* The power to impose a tax and to determine what property shall bear the tax can only be determined by the legislative department of the government. If Congress undertakes to lay down a guide for administrative officers to enforce it in carrying out its mandate, it must be by an intelligible and a reasonable, definite standard." (Emphasis added.)

Butler v. U. S. was affirmed by the Supreme Court in 297 U. S. 1.

Carter v. Carter Coal Co., 298 U. S. 238 (1936).

Bituminous Coal Conservation Act of 1935 (49 Stat. 991, Ch. 824) was held unconstitutional in a suit by a stockholder to enjoin the corporation from submitting to legislative regulations which were unconstitutional.

> "Beneficent aims, however great, or well directed, can never serve in lieu of Constitutional Power." (p. 291.)

Note: The Act was rewritten and re-enacted with appropriate standards, safeguards, and criteria as the "Bituminous Coal Act of 1937 (50 Stat. 72) and was thereafter held to be constitutional in the case of *Sunshine Coal Co. v. Adkins,* 310 U. S. 381 (1940). (Justice McReynolds still dissented.)

The rewritten Act is a good example of a properly drafted Act providing the safeguards of due process, notice and prior hearings, before rules and regulations are adopted, also notice of charges, opportunity to be heard, impartial hearing and right to judicial review.

National Labor Relations Board v. Prettyman (1941, C. C. A. 6), 117 F. (2d) 786.

The National Labor Relations Act, 29 U. S. C., Sec. 151 *et seq.*, Sec. 160(e) of which authorizes the Circuit Court of Appeals to review the Board's acts. Proceeding was for enforcement of a "cease and desist" order issued by the board. Petition denied. (p. 788.)

> "The Court is not compelled to enforce an order of the Board which is impregnated with a hearing not conforming with the standards of fairness inherent in procedural due process." (p. 791.)

Walling v. McCracken County Peach Growers Assn., 50 Fed. Supp. 900 (1943, D. C. Ky.).

Fair Labor Standards Act (29 U. S. C. 206 and 207) was in part held unconstitutional and invalid in an action brought by the administrator to enjoin a violation of a regulation made thereunder. Judgment was for the defendant, the court stating:

> "When there is no rational connection between the declared policy of Congress and the regulation of the administrative body, the regulation can be declared invalid." (p. 905.)

Acts of state legislatures which attempt to delegate legislative functions without appropriate statement of policies, standards, criteria or guides are unconstitutional.

In re McLain, 190 Cal. 376 (1933).

Section of the California Motor Vehicle Act held unconstitutional, upon the ground that a man had the audacity to drive 28 miles an hour on the Colorado Street Bridge, entering Pasadena. Under the attempted delegation of power by the legislature, the State Highway Commission had fixed a lower speed limit. This delegation of authority was attacked and held to be unconstitutional (pp. 379-381), and the culprit was acquitted.

State v. Retowski, (1934, Del.), 175 Atl. 326, 6 W. W. Harr. 330.

Liquor Control Act of Delaware held unconstitutional as a grant of legislative powers without adequate safeguards. Criticized lack of publication of regulations also. (p. 329.) This decision also quoted with approval, from *Goodloe v. Logan*, 251 N. W. 35, 43 (Ia., 1933), which held unconstitutional Section 5066 of the Code of Iowa,

granting unfettered legislative authority to the Highway Commission, and in so doing stated at page 43:

"Thus, an analysis of every case cited by the appellant presents the situation only where the details of the statute are left to be administered by a board or commission in applying the law as expressed in the statute. If the legislature had a right to pass section 5066, granting to the highway commission the authority to adopt rules and regulations governing the stopping of cars upon a paved highway, the legislature can also empower the highway commission to pass rules and regulations governing the speed and right of way, and all duties of automobile drivers. If the legislature can delegate to the highway commission the right to do these things, then, of course, the legislature can delegate to the highway commission the same power to the board of control, to the insurance commissioner, superintendent of banking, and all other administrative departments of the state may be likewise empowered to enact rules and regulations to be given the force of statutes, which said commission might in their judgment determine to be for the general protection of the public. Once such bureaucracy has fastened itself into the life of legislative power, little else need be done by the legislature than to meet and create boards. The legislature has no such right to delegate to the highway commission legislative power to pass rules and regulations concerning the use of the primary highways of this state by the people of this state, such as Rule VII. If the legislature in its wise judgment desires to pass such a statute, it, of course, has the right and authority to do so, for the legislature is composed of the representatives of the people; it is chosen by the people for the purpose of making the

laws of this state. The legislature cannot transfer the power of making laws to any one else, or to place the right to make laws anywhere but where the people have placed it. The highway commission is appointed by the Governor of the state for the purpose of administering the laws and not for the purpose of making the laws. If the right were given to the highway commission to make the laws governing the highways of this state, how is the individual using the highways to know what rules and regulations the highway commission passes? The highway commission meets at various and different times. It might pass some rule or regulation today and revoke it next week. There is no way that the people throughout this state could know just what were the rules and regulations that the highway commission adopted. About the only way that one could be certain as to what rules and regulations were — if the highway commission had the right to pass them — would be to telephone to the highway commission every time one started on a journey, and if that journey were to be a long one, a wise and cautious individual would put in a telephone call before starting on the return journey.

"Thus, it seems to us that the legislature under Code No. 5066 has left to the highway commission first to say whether there shall be any law, and second, what that law shall be. This is a delegation of legislative power and same is unconstitutional. Thus the court erred in directing the verdict and the judgment of the lower court must be, and it is hereby reversed."

McDougal v. Lucider (1945), 389 Ill. 141, 156 A. L. R. 1059.

This decision involved the Illinois Community Currency Exchange Act, Ill. Rev. Stat. 1943, Chap. 16½, Par. 31 *et seq.*, which was attacked on the ground of improper delegation of legislative powers under Illinois Constitution and Section 1 of the Fourteenth Amendment to the United States Constitution. Section 4, Sub-section (c), gave discretion to the Auditor of Public Accounts, and the Act contained no limitations as to what information the Auditor might require and that a license issued might be revoked at the whim of the Auditor (p. 1067).

Held unconstitutional (p. 1068); also held that the unconstitutional section was severable from the remainder of the Act. (p. 1068.)

Re Opinion of the Justices, 52 N. E. (2d) 974 (S. Ct. Mass., 1944), 150 A. L. R. 1482.

The delegation of blanket War powers to the Governor was there held to be unconstitutional.

State of N. J. v. Larson, 10 N. J. Misc. 384 (1932).

The State Aviation Act (Pamp. 4 (1931), Chap. 190, p. 475) was there held unconstitutional as the statute fixed no standard, guide, or criterion for the aviation commission in the establishment of its regulations for uniform field rules for airports, and hence is an unconstitutional attempt to delegate legislative power.

Hoff v. State (1938, Del.), 197 Atl. 75, 9 W. W. Harr. 134.

The Beauty Culture Act, Chap. 122, Vol. 40, Laws of Delaware, were held to be unconstitutional.

The decision quotes from Judge Ranney in *Cincinnati W. & Z. Ry. Co. v. Clinton County Comr's*, 1 Ohio St. 77, that:

> ". . . the true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority and discretion as to its execution, to be exercised in pursuance of the law." (p. 79.)
>
> "The Legislature must declare the policy of the law, and must establish some principle or rule of action which is to control in given cases. In other words the Legislature must provide an adequate yardstick for the guidance of the administrative body empowered to execute the law." (p. 79.) (Citing numerous authorities.)
>
> *Ohio Valley Water Co. v. Ben Aven;* 253 U. S. 287.

This decision holds the Pennsylvania Public Service Company Law of 1913 to be unconstitutional, as it improperly delegated to the commission unlimited rule making authority without requiring a judicial review.

Smithberger v. Banning, 129 Neb. 651.

The Emergency Relief Act of Nebraska was here attacked as being unconstitutional on the ground, among others, that the Act was in violation of the Nebraska Constitution, as it attempted to delegate legislative powers to the Congress of the United States and to the executive branch of the State Government.

The Act was held unconstitutional as an improper attempt to delegate legislative powers. (See p. 696.)

An excellent compilation of cases appears on page 691.

EVEN CITY ORDINANCES, WHICH ATTEMPT TO DELEGATE LEGISLATIVE AUTHORITY MAY BE HELD UNCONSTITUTIONAL.

Yick Wo v. Hopkins, 118 U. S. 356 (1885).

Yick Wo, and some eighty other Chinese, all subjects of the Emperor of China, ran laundries in San Francisco, and were denied licenses, although all white people, with the exception of one, were granted licenses by the board of supervisors under an ordinance which gave authority to the board of supervisors to grant or deny licenses. The case came to the Supreme Court on the sole question as to whether the plaintiff had been denied a right, in violation of the Constitution, laws, and treaties of the United States.

The Supreme Court held (p. 366) that the ordinance was unconstitutional as it confers:

> ". . . not a discretion to be exercised upon the consideration of circumstances of each case, but an Ordinance granting power to give consent not only as to place, but as to persons."

The ordinance was held to be in violation of the Fourteenth Amendment to the Constitution of the United States.

The court also held at page 369 that the ordinance was void, because its administration operated unequally.

Our government should be:

> "A government of Laws and not of man."

As recently as March 6, 1947, this Honorable Court has again recognized this historic phrase as expressing the aim of "those who framed the Declaration of Inde-

pendence and founded the Republic. 'A government of laws and not of men' was the rejection in positive terms of rule by fiat, whether by the fiat of governmental or private power. Every act of government may be challenged by an appeal to law as finally pronounced by this Court."

United States v. United Mine Workers, 91 L. Ed. (Adv. Op.) 595 (concurring opinion of Mr. Justice Frankfurter).

(c) Rule Is Continuous That Unlimited Delegation of Legislative Power Is Repugnant to the Constitution.

The decisions have universally recognized that there are limitations on the authority of a legislature to delegate its legislative functions, and acts are only to be upheld where Congress *or the legislature has, within the act itself declared a definite policy, established standards, limits, criteria or guides* to control the administrative authority in exercising the delegated rule making or fact finding authority.

Morgan v. U. S., 304 U. S. 1 (1938).

There was here involved an order of the Secretary of Agriculture, fixing maximum rates to be charged by market agencies pursuant to the "Packers and Stockyards Act 1921," 42 Stat. 159, 7 U. S. C. 181-229, which order was here held unconstitutional as a denial of due process in that the hearing held pursuant to the requirements of Section 310 of the Packers and Stockyards Act had not been a "full hearing," and the decision of the District Court composed of three judges, dismissing the bills of complaint, was reversed.

Dahlberg v. Pittsburg & L. E. R. Co., 134 F. (2d) (1943).

The Railway Labor Act of 1934, 45 U. S. C. A., Sec. 151 *et seq.*, was here under consideration as to the finality of the Labor Management Adjustment Board's decision, and in interpreting the act the court stated:

> "If the Act should be interpreted as precluding consideration of the merits of the Court, serious doubts as to the constitutionality would arise. Such interpretations would amount to investing the Board with full judicial power . . .
>
> "If it could be assumed that the Adjustment Board was a governmental agency, still other doubts as to the constitutionality would be present, for example, as to the question as whether there is such a lack of safeguards in the procedure before the Board as to be a denial of due process—there being no court review on the merits."

Decision of the District Court dismissing the complaints and declining to enforce the Board's award, affirmed.

> "In creating such an administrative agency the legislature, to prevent it being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necesary principle that such an agency must pursue the procedure and rules enjoined, and show a substantial compliance therewith to give validity to its action."

Wichita Ry. & Light Co. v. Public Utilities Company, 260 U. S. 48, 59.

Mahler v. Eby, 264 U. S. 32, 44.

The cardinal principle to be observed by legislatures in the granting of authority to administrative bodies to make rules and regulations having the effect of law is, *that there must be found in the law itself a reasonable clear formula by which the grantee of the power must be governed.*

(d) The Rule Has Been Uniformly Recognized Even in Decisions Upholding the Constitutionality of Acts Wherein There Has Been Delegated Within the Prescribed Limits or Policies the Rule Making Authority.

The courts have universally recognized that there are limits to the power of a legislature to delegate the legislative authority and that such delegation of the power to make laws is only to be upheld where the legislature or Congress has within the act declared a definite policy and has established standards or set forth requirements for findings of facts or conditions to be met by the administrative authority before exercising the delegated authority to make rules and regulations.

The Brig Aurora Burnside v. United States, 7 Cranch 382 (1813).

One of the earliest cases in commencing the evolvement of the rule of law which now and for the past more than one hundred years has been the established law of our land to the effect that only by providing within the act itself, a definite policy, standard, rule or criteria, is Congress permitted to delegate to others any of its essential legislative functions.

There the court held that Congress was permitted to delegate to the President the authority to make a finding of fact as to the friendliness or unfriendliness of the

nations, Great Britain and France, named in the act and by his proclamation to start or stop the operation of the machinery of the completely detailed embargo act of March 1, 1809, which was there under consideration.

Following the early decision of the *Brig Aurora* case as determined by the Supreme Court in 1813 came the decision of *Wayman v. Southard,* reported in 10 Wheaton 1 (1825), which particularly had to do with the right of Congress to delegate to the courts the power of altering modes of proceedings in suits, by rules, and whether or not the laws of Kentucky respecting executions had application to proceedings in the United States District Courts. In that decision the court early enunciates the rule that while the division between the legislative and judicial department has not been entirely or clearly determined, where the general provisions have been stated in an act, the power may then be given to those acting under the provision to "fill in the details."

Some years later this court again reiterated this same fundamental principle in the case of *Field v. Clark,* 143 U. S. 649 (1892). In holding a part of the Act of October 1, 1819, to be merely a delegation to the President of authority to make a finding of fact and not a delegation of legislative authority, this court therein stated:

> "The principle that Congress cannot delegate legislative power even to the President, is recognized as vital to the integrity and maintenance of the System of Government ordained by the Constitution."

and the court therein for that reason found that the act there being considered was "not inconsistent with that principle" and, therefore found it to be constitutional.

It is interesting to note that even so, Chief Justice Fuller and Justice Lamar dissented on the ground that

> ". . . no part of this legislative power can be delegated by Congress to any other department of the government, executive or judicial, as an axiom in constitutional law, and is universally recognized as a principle, essential to the integrity and maintenance of the system of government ordained by the Constitution. The legislative power must remain in the organ where it is lodged by that instrument." (p. 697.)

In considering the manner in which the policy, guides, criteria or standards of the legislative body may be established and the remainder of the duties delegated to the administrative tribunal, we are led to a consideration of the decision of *Buttfield v. Stranahan*, 192 U. S. 470 (1903). By the legislation therein considered, the Secretary of the Treasury was authorized to fix and establish uniform standards of purity, quality and fitness for consumption of all kinds of tea imported into the United States. The secretary was in such legislation authorized to procure and deposit in certain ports duplicate samples of standards which he might fix. In this decision the legislation was found to be constitutional, because the purposes of the act were expressed "to exclude the lowest grades of tea where demonstrable of inferior purity, or unfit for consumption, or presumably so because of their inferior quality." The court continues its opinion by stating as follows:

> "This, in effect, was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute."

Thus again we have an illustration of one class of cases in which authority may lawfully be delegated to admistrative or executive agencies or officials. Here the court found that a "primary standard" had been fixed in the legislation itself, and that merely the executive duty of determining what quality of tea did or did not come within that standard was delegated to the executive. This decision will illustrate the wisdom of the constitutional requirement that standards, guides, policies or criteria must appear in the legislation itself. Where such standards, guides, criteria or policies are present, the authority, actions and functions of the administrative agency are directed and controlled by the legislature, which is the proper governmental agency so to do. Without such standards, guides, criteria or policies being incorporated in the legislation itself, administrative action can and has run rampant and uncontrolled.

It is apparent that Section 5(d) of the Federal Home Owners Loan Act of 1933 as amended contains no such standards, criteria, guides or policies as will direct the administrator in the performance of his duties, as specified in said subsection.

Next in chronological order under this division of the plaintiff and appellees' brief having to do with the consistent rule of cases comes the so-called "bridge cases," which are, respectively:

Union Bridge Co. v. United States, 204 U. S. 346 (1907);

Monongahela Bridge Co. v. United States, 216 U. S. 177 (1910).

These two decisions confirmed the constitutionality of legislation by which the Secretary of War was given su-

pervisory authority over bridges crossing navigable waters, which might constitute a reasonable obstruction to free navigation. Both decisions followed the reasoning of the early cases that the executive branch of the government or an administrator might validly be given authority by Congress to administer an act so long as sufficient standards were contained in the legislation itself. The latter of these two cases contains the appropriate statement by the court as follows:

> ". . . That the statute in effect prescribed the general rule, applicable to all navigable waters, that free navigation should not be hampered by unreasonable obstructions arising from bridges of insufficient height, width of span or other defects; that instead of exerting its power by direct legislation in each case of a bridge alleged to constitute an unreasonable obstruction to navigation, Congress charged the Secretary of War with the duty of ascertaining, in each case, upon notice to the parties concerned, whether the particular bridge came within the general rule prescribed. . . ." (pp. 192-193.)

In *St. Louis, Iron Mountain and Southern Railway Co. v. Taylor, Admx.*, 210 U. S. 281 (1908), was involved the question of whether or not Section 5 of the Safety Appliance Act improperly delegated to the American Railway Association and the Interstate Commerce Commission the right or power to designate and promulgate appropriate standards for the height and maximum variation of draw bars for freight cars. In that decision again this court consistently with prior determinations found that only determination of minor detailed administrative acts was involved. Likewise, the court in this decision took the posi-

tion that the act was constitutional and was not an improper delegation of legislative functions because the standards, guides, criteria and policies had been indicated to the American Railway Association and the Interstate Commerce Commission by express terms in the legislation itself.

The next three cases in chronological order are:

U. S. v. Grimaud, Same v. India, 220 U. S. 506 (1910);

Red "C" Oil Manufacturing Co. v. Board of Agriculture of North Carolina, 222 U. S. 380 (1911);

Interstate Commerce Commission v. Goodrich Transit Co.,

Interstate Commerce Commission v. Same, U. S. v. White Star Line, U. S. v. Same, all reported as 224 U. S. 194 (1912).

These decisions reported in 1910, 1911, and 1912, respectively, show the geographical and historical developments taking place in our county at about that time. The first case involved legislation containing copious recitals which indicate the purpose of the act, such as to improve and protect the national forests, furnish a continuous supply of timber, protect the forests against destruction by fire, etc. In that case, the Secretary of Agriculture was expressly authorized to promulgate rules and regulations, one of which, No. 45, required persons to obtain permits before grazing cattle on the reservations. The general purposes, interests, criteria, standards and policies of the act being clear, sufficient and appropriate, the court stated that the delegation of rule-making power to the Secretary

concerned only the means of providing the various details of management, and, in view of the plentiful legislative standards appearing in the act; held that the legislation was constitutional, thus complying with the long established consistent rule requiring the legislative body to take over those details which the act might lawfully delegate.

In *The Red "C" Oil Manufacturing Company* case attack was made upon legislation authorizing the Commissioner of Agriculture to make rules and regulations for inspection of oil, adopt standards of safety, purity thereof, etc. This authorization immediately followed a section of the act in which were recited the purposes of the legislation, namely, that of determining their safety and value for illuminating purposes. The court very appropriately, through Chief Justice White, stated that the legislative requirement being that illuminating oils furnished in North Carolina should be safe, pure, and afford a satisfactory light, it was left to the Board of Agriculture to determine what oils would measure up to these standards. Citing *Buttfield v. Stranahan,* 192 U. S. 470, 492, the court stated as follows:

> "We think a sufficient primary standard was established, and that the claim that legislative powers were delegated is untenable."

Likewise in *Interstate Commerce Commission v. Goodrich Transit Company,* 224 U. S. 194, attack was made on orders of the Interstate Commerce Commission authorizing certain types of accounting by concerns engaged in interstate commerce and denying the right to use others. From the decision it appears that the act itself describes in detail what accounting reports shall contain, and in

other ways establishes the required primary standard. Such legislation and the action of the commission under it was held to be in keeping with the uniform rule of constitutional law in the following paragraph:

> "The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress." (p. 214.)

Following the consistent rule again in *Philadelphia Co. v. Stimson*, 223 U. S. 605 at 638 (1912), it was held that the Secretary of War could lawfully be authorized to establish harbor lights where it had been made manifest to him that such establishment is essential to the preservation and protection of harbors. Likewise in this legislation the primary standard had been established in the legislation itself, which served as a guide to the actions of the administrative official.

The first world war gave rise to the next two decisions: *Selective Draft Law Cases*, 245 U. S. 366 (1918) and *McKinley et al v. United States*, 249 U. S. 397 (1919). The former of these two cases involved the authority of the federal government to delegate to the President of the United States the power, in his discretion, to temporarily or permanently enlarge the number of men carrying arms for this country. In fact, the force of the act was promulgated by a proclamation of the President. By the time the litigation in the first case was commenced, the United States was well into the first world war, and

the contentions of the objectors to the selective service act were handled in summary fashion. Therefore, in this decision and the immediately following decision of *McKinley et al. v. United States*, the court quickly stated its position that the question had been determined by previous decisions of this court, and that in the first case the delegation was properly made as has been indicated previously and that, in the second case the secretary of War having been directed to do all things necessary to preserve and protect the morals of the servicemen, it was well within the delegated powers of his office as such Secretary of War to provide that any houses that might taint their morals should not be located within a limited number of miles of a military camp.

A somewhat different approach to the same problem is made in the case of *Avent v. United States*, 266 U. S. 127 (1924). In the act involved in this decision the Interstate Commerce Commission was authorized by the Transportation Act of 1920 to suspend its rules as to certain services and to make other rules regarding such "as in the Commission's opinion will best promote the service in the interest of the public and the commerce of the people." The Interstate Commerce Commission therefore, after a considerable investigation and full recitals, in its order directed that certain coal cars be furnished to miners in keeping with the prescribed order. The court held the act consitutional and stated its appropriate conclusions as follows:

> "The statute confines the power of the Commission to emergencies, and the requirement that the rules shall be reasonable and in the interest of the public and of commerce fixes the only standard that is practicable or needed." (p. 130.)

Readjustment following the first world war gave occasion to the holding in *United States v. Chemical Foundation, Inc.*, 272 U. S. 1 (1926). There the President of the United States was given authority to manage property of the alien property custodian, make disposition thereof, etc., pursuant to such rules and regulations as he might prescribe and through such officers as he might direct. This delegation was held to be a proper and constitutional assignment of authority to the President, in keeping with the general and consistent rule, particularly because the detailed circumstances of each seizure and disposal of property seized must be ascertained in order to deal with it. In delegating such authority to the President and further providing that property, except that sold to the United States, shall be sold only to American citizens at public sale to the highest bidder after public advertisement, unless the President stating the reasons therefor, in the public interest shall otherwise determine, the court concluded that the actions of the President were not legislative but were actions of an administrative nature performed by him under an act, and particularly stated the generally applicable rule in the following language:

> *"The determination of the terms of sales of enemy properties in the light of facts and conditions from time to time arising in the progress of war was not the making of a law; it was the application of the general rule laid down by the Act. When the plenary power of Congress and the general rule so established are regarded, it is manifest that a limitation upon the excepted class is not a delegation of legislative power."* (Emphasis added.) (p. 12.)

J. W. Hampton, Jr. & Company v. U. S., 276 U. S. 394 (1928).

Here was involved the constitutionality of an act of Congress which authorized the President, upon investigation, etc., to vary the duties on imports so as to equalize the cost of producing and marketing foreign-grown commodities with competing commodities grown and marketed in our own country. The court here also follows the general and consistent rule that standards, guides, etc. sufficient for the occasion were found in the legislation, as follows: to equalize the cost of production in the United States with that of a foreign country and to protect domestic commerce against competition by imported products from foreign countries where the cost of producing is much less than that in our own country. It is further to be observed that in this legislation the items which the President must consider in fixing the duties were expressly specified, that is, the difference of conditions of production, including wages, costs of material, etc. The court again reiterated the usual and consistent rule in the following language:

> "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." (p. 409.)

The decision of *New York Central Securities Corporation v. United States, et al.*, 287 U. S. 12 (1932), involved the constitutionality of an amendment to the Interstate Commerce Commission. Here the commission was authorized to perform certain acts and to promote acquisition of control of one carrier by another, and other consolidations, when certain facts were found by them to exist. Likewise the court in this decision, citing cases

referred to above, concludes that sufficient policies, criteria and standards are included in the act, and holds it constitutional, particularly because of its conclusions in the following quoted language:

> "The provisions now before us were among the additions made by Transportation Act, 1920, and the term 'public interest' as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred." (p. 25.)

In 1933 this Court decided the case of *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.* (Station WIBO), 289 U. S. 266 (1933), in which the opinion was written by Chief Justice Hughes. It appears that the Station WIBO was owned by the applicants, Nelson Brothers Bond & Mortgage Co., who with other requested modification of licenses from the Federal Radio Commission. Under the act the licensing authority that is the Federal Radio Commission was directed to make and maintain fair and equitable allocation of broadcasting licenses, of bands of frequency or wave lengths, periods of time for operation, station power etc.

Again, the Court indicates that in view of the numerous standards and guides included there was no improper delegation of authority. In other words the Act expressly instructs the Commission to make these allocations "according to population" and the Act furthermore contains an expressed decision, "That the people of all

the zones established by section 2 of this Act are entitled to equality of radio broadcasting service, both of transmission and of reception," and the Act further expressly provides that, "in order to provide said equality the licensing authority shall as nearly as possible make and maintain an equal allocation of broadcasting licenses, of bands of frequency or wave lengths, of periods of time for operation, and of station power, to each of said zones when and in so far as there are applications therefor; . . ."

After considering all the immediate foregoing standards found in the Act itself indicating the matter in which the authority must administer the Act, the Court considering the question of improper delegation states as follows.

> "In granting licenses the Commission is required to act 'as public convenience, interest or necessity requires.' This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. Compare N. Y. Central Securities Co. v. United States, 287 U. S. 12, 24. The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services, and, where an equitable adjustment between States is in view, by the relative advantages in service which will be enjoyed by the public through the distribution of facilities. In making such an adjustment the equities of existing stations undoubtedly demand consideration. They are not to be the victims of official favoritism. But the weight of the evidence as to

these equities and all other pertinent facts is for the determination of the Commission in exercising its authority to make a 'fair and equitable allocation'." (p. 285.)

Chronologically, and in considering the consistent rule of the cases concerning delegation of legislative authority, we should now consider the two opinions written last fall entitled *North American Company v. Securities and Exchange Commission*, 90 L. Ed. Adv. 737 and *American Power and Light Co. v. Securities and Exchange Commission*, 91 L. Ed. Adv. 89.

The foregoing decisions considered under the instant point of our brief concern the consistent rule that in order for a delegation of legislative authority to be valid and constitutional, it is essential that guides, standards or criteria be included directing or indicating to the delegatee, the executive or administrative body the manner in which the authority or legislation so delegated may be exercised. It is submitted that the consistent rule that such standards, criteria, policies or guides must, in a pertinent and appropriate manner, indicate to the person or organization to whom the authority is delegated generally the purposes for which, or the matter in which, his actions shall be carried out. The purpose for such requisite is clear; it will serve to prevent unbridled "roving commissions" from using federal authority in an unconstitutional and an unamerican manner.

From first to last the decisions of this Court on this particular point are consistent with the rule which has prevailed since *The Brig Aurora* decision in 1813.

The Court consistently applies the rule and in the two opinions shows that acquired criteria, standards and guides are present. Counsel for plaintiffs, appellees, have endeavored to illustrate the difference between the Public Utility Holding Company Act and the particular sections thereof under attack in Securities and Exchange Commission cases and the Home Owners Loan Act of 1933 involved in the instant appeal. This has been done by a comparison of the parallel provisions, if any there are, in the two acts concerning due process and particularly the point under special consideration here namely, that of delegation of legislative authorities. The Court will readily and visually perceive that the Home Owners Loan Act of 1933 and particularly section 5(d) thereof contains none of the guides, standards, criteria and policies as are included in the Public Utility Holding Company Act. The Court will further observe the absence of provisions of due process from the Home Owners Loan Act of 1933, which are readily appreciable as being in the Public Utility Holding Company Act.

The most recent decisions of similar import are those of the Court in the cases of *North American Company v. Securities and Exchange Commission*, 90 L. Ed. Adv. Op. 737 and *American Power and Light Co. v. Securities and Exchange Commission*, 91 L. Ed. Adv. Op. 89, both of which attack the Public Utility Holding Co. Act, 15 U. S. Code, Sec. 79k(b) also known as Section 11(b) of the Act. The first cited case had to do with subdivision (1) and the second with subdivision (11) of that Act. The

Public Utility Holding Company Act is clearly distinguishable from the Home Owners Act as can readily be seen from the appropriate provisions quoted below:

COMPARISON OF CONSTITUTIONAL REQUIREMENTS FOR LEGISLATIVE POLICIES, STANDARD AND DUE PROCESS.

PUBLIC UTILITY HOLDING CO. ACT.	HOME OWNER'S LOAN ACT OF 1933
Sec. 11(b) 1 and 2 also 15 U. S. C., Sec. 79k.	12 U. S. C. Sec. 1464, also Sec. 5 of Act.
Sec. 11(b)(1), *i. e.*, sec. 79k(b) of Title 15 U. S. C. is attacked in *North American Co. v. Securities and Exchange Commission*, 90 L. Ed. Adv. Op. 737. The Section reads as follows:	Board authorized to prescribe rules Section 5(a) (1464(a)):
"(b) Limitations on operations of holding-company systems.—It shall be the duty of the Commission, as soon as practicable after January 1, 1938:	"Federal Savings and Loan Associations.—(a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations,' and to issue charters therefor giving primary consideration to the best practices of local mutual thrift and home financing institutions in the United States.
(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public utility system; Pro-	

PUBLIC UTILITY HOLDING CO. ACT.

vided, however, That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems can not be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of each additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to im-

HOME OWNER'S LOAN ACT OF 1933

Unlimited delegation of authority to appoint conservator, merge, liquidate, etc., is contained in Sec. 5(d) (1464(d)) attacked in this action:

"(d) The Board shall have full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation.

pair the advantages of localized management, efficient operation, or the effectiveness of regulation.

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.

Sec. 11(b)2; Sec. 79k (b)(2) of Title 15 U. S. C. is attacked in *American Power and Light Co. v. Securities and Exchange Commission*, 91 L. Ed. Adv. Op. 89.

The section reads as follows:

"(2) To require by order, after notice and op-

portunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holdings, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of

Public Utility Holding Co. Act.	Home Owner's Loan Act of 1933
fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company, or of any company whose principal business is that of a public-utility company.	
The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24 (Sec. 79 of this title)."	
The subject of hearings by the Commission is set forth in Sec. 19 (79a):	
"Hearings by Commission.—Hearings may be public and may be held before the Commission, any member or members thereof, or any officer or officers	No corresponding provisions.

PUBLIC UTILITY HOLDING CO. ACT.	HOME OWNER'S LOAN ACT OF 1933
of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before the Commission, the Commission, in accordance with such rules and regulations as it may prescribe, shall admit as a party any interested State, State commission, State securities commission, municipality, or other political subdivision of a State, and may admit as a party any representative of interested consumers or security holders, or any other person whose participation in the proceedings may be in the public interest or for the protection of investors or consumers. (Aug. 26, 1935, c. 657, Title I, Sec. 19, 49 Stat. 832.)	
A court review of orders is prescribed in Sec. 24 (79x):	
"Court Review of orders.—(a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals	No corresponding provisions.

of the United States within any circuit wherein such person resided or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any offer thereof designated by the Commission for that purpose and thereupon the Commission shall certify and file in the court a transcript of record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Com-

mission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the Court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its rec-

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ommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended, 28; 346, 347.)

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. (Aug. 26, 1935, c. 687, Title I, Sec. 24, 49 Stat. 834.)

The District Courts are expressly given jurisdiction of offenses and suits in Sec. 25(79y):

"Jurisdiction of offenses and suits. The District Courts of the United States, the District Court of Columbia, and the United States courts of any Terri-

No corresponding provisions.

tory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this title or rules, regulations, or orders thereunder, may be brought

in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U. S. C Title 28, secs. 225 and 347) (26: 225, 347), and section 7, as amended, of the Act entitled "An Act to Establish a court of appeals for the District of Columbia," approved February 9, 1893 (D. C. Code (1929), Title 18, sec. 26), (D. C. Code 1940, Sec. 17-01). No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against the Commission in any court. (Aug. 26, 1935, c. 687, Title I, Sec. 25, 49 Stat. 835.)

In the first of the two cases recently decided, that is *North American Co. v. Securities and Exchange Commission, supra,* the constitutionality of Sec. 11(b) 1 was questioned from the standpoint of the due process clause of the fifth amendment in that there was a taking of property without just compensation. This court answered that argument by stating at page 749 that there was "no basis here for assuming that in limiting the scope of North American's operations there will be dispositions of securities for inadequate considerations, thereby raising a question as to whether there is a destruction of these values without just compensation. The Act does not contemplate or require the dumping or forced liquidation of securities on the market for cash. Under section 11(d) and 11(e) of the Act, an "investment or reorganization plan must meet the standards of fairness and equitableness." Then on page 750 the opinion continues: "Any plan of divestment or reorganization, moreover, must be carefully scrutinized by both the commission and the enforcing court, thus enabling the assertion and protection of all shareholders' rights. (See *Otis & Co. v. Securities and Exchange Commission*, 323 U. S. 624.) And there are provisions in the Act guarding against unduly rapid divestment or liquidation. In the light of such statutory and judicial safeguards and in the absence of any alleged unfair plan of divestment we cannot say that the North American's shareholders are adversely affected, from a constitutional viewpoint, by the operation of section 11(b)(1)." It should be noted in this connection that under section 11(c) holding companies are given at least a year to comply with an order of the commission under section 11(b).

The second case, that of *American Power and Light Co. v. Securities and Exchange Commission, supra,* is concerned with the constitutionality of section 11(b)(2) and has to do with the same combination of utility companies. The following are extracts from the opinion:

"Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations. Such is the situation here." (p. 99.)

"The legislative policies and standards being clear, judicial review of the remedies adopted by the Commission safeguards against statutory or constitutional excesses." (p. 99.) Judicial review was provided in Act (Sec. 25).

"Equally groundless is the contention that sec. 11(b)(2) is void in the absence of an express provision for notice and opportunity for hearing as to security holders regarding proceedings under that section. The short answer is that such a contention can be raised properly only by a security holder who has suffered injury due to lack of notice or opportunity for hearing. No security holder of that type is now before us. The managements of American and Electric admittedly were notified and participated in the hearings as required by sec. 11(b)(2)." (p. 99.)

"However, the Commission in this instance actually gave all security holders of American and Elec-

tric public notice of the pendency of the sec. 11(b)(2) proceedings and invited them to file applications for intervention before a stated time. This was done pursuant to sec. 19, 15 U.S.C.A. Sec. 79a." (p. 100.)

PUBLIC UTILITY HOLDING CO. ACT CASES ARE CONSISTENT WITH PRIOR DECISIONS.

Counsel for defendant appellants have cited variously in their brief (A. B. 24, 32, 59, 66, 73, 76, 84, 88) excerpts from the opinion of this court in *American Power & Light Co. v. Securities & Exchange Commission*, Nos. 4 & 5, this Term, decided Nov. 25, 1946, as indicating that the established law had been overthrown and that as a result of this opinion it is no longer true that legislative enactments had to contain standards, guides, policy, or criteria appropriate and pertinent to the ends to be accomplished by the administrative agency concerned.

We submit this as not so. The Act under attack there, the Public Utility Holding Company Act, contained within it many standards and directives as shown by the chart above, and when Mr. Justice Murphy used the words "But these standards need not be tested in isolation." (91 L. Ed. Adv. Op. 89 at 98.) The following words should be read with this statement to gain its true meaning. These words are "They derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear . . . the general policy declarations of Congress in section 1(c); the standards for new security issues set

forth in section 7 . . . the conditions for acquisitions of properties and securities as described in section 10 . . . and the nature of the inquiries contemplated by section 11(a) . . . a veritable code of rules reveals itself for the Commission to follow in giving effect to the standards of section 11(b)(2) . . . it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations. Such is the situation here." It therefore follows that rules, standards, etc., were present in The Public Utilities Holding Company Act in sufficient detail to accomplish the ends prescribed for the administrative agency. It is not believed that the use of the words "standards need not be tested in isolation" means anything but what it states. In the present case there are no standards to be found anywhere in the Act and as the presiding judge of the trial court stated in his opinion the Act in the present case "makes no attempt to lay down rules for the guidance of the board, nor does it state in what circumstances or under what conditions the board is to merge institutions or to appoint a conservator or receiver. It establishes no criteria to govern the board's course. It does not require any finding by the board as a condition of its action, nor policy as declared by Congress as to merger or appointment of a conservator. The section gives to the Board unlimited authorization to formulate rules for the board's action in the respects mentioned and to so do as it may see fit. The only restrictions on those powers were to be such as the board might choose to put upon itself in the rules and regulations which it, the board, adopted to

govern itself. We are unable to find in the Act a declaration of policy or standard of action which can be deemed to relate to the subject of section 5(d)." [R. 377.]

Although the *American Power and Light Co.* decision, *supra*, was rendered subsequent to the opinion of the court below, it is to be noted in the last quoted words from the opinion of the trial court that it did not look only to section 5(d) to find a declaration of policy or a standard of action, but it showed that the statutory three judge court had examined the Act as a whole for such declaration and could not find any . . . there is none.

The H.O.L. Act as a whole is as lacking in directives as is Section 5(d) taken as an "isolated" section.

The opinion in the *American Power and Light Company* case, *supra*, is not taken to mean that the administrative guides are to be taken from the history or origin of the Act but rather that statements of legislative policy and standards found within the Act may be interpreted in the light of the history or origin of the Act. It is still the rule that an unbridled delegation of legislative authority is repugnant to the constitution. In this respect the Home Owners Loan Act is fatally defective under the opinion in the *American Power and Light Company* case as well as in all previous decisions of the court on the subject. It is further submitted that it is also still the rule and not changed by these recent decisions that such guides as may be provided by Congress must be sufficient to indicate the intention of the legislature and must not constitute solely "a roving commission" for the

administrative official to do what he wishes when and in whatever manner he wishes, or for whatever reason personal or otherwise he may have, at the time he does it.

It is further believed that if Congress provided guides, standards, criteria or other directives, they must in some way be suited to the problems under consideration; simple problems require simple rules. A legislative directive might be sufficient to provide regulations to authorize a stock issue, but the same directive might well be insufficient to justify a conviction of a felony or the deprivation of the life earnings of 16,000 people. The legislative guides which might be sufficient to provide for a summary seizure of an insolvent institution might well not be sufficient to provide for the seizure of a solvent institution. In one case an emergency might require summary action where as in the other case, no emergency might be present and due process would require more deliberate action. There should be some casual connection between the standards given and the authority granted. Variations in factual situations might appear to give rise to inconsistencies in the previous opinions of this court but it is believed that underlying them all the fundamental doctrines are the same and that the principles so ably enumerated in the *Schechter Corp. v. U. S.*, 295, U. S. 495, and *Panama Refining Co. v. Ryan*, 293, U. S. 388 are, and always have been the law, from the time of the opinion of this court in 1813 in the case of the *Brig Aurora Burnside v. U. S.*, 7 Cranch, 382, down to the present time.

(e) Comparison With Other Acts Which Have Been Heretofore Declared Unconstitutional Due to the Delegation of an unfettered Legislative Authority.

Other legislative acts containing more comprehensive and more definite statements of policy, standards, guides, criteria, and limitations as to the legislative rule making functions being delegated, than does this the Federal Home Owners Loan Act of 1933, have been declared unconstitutional as delegating unfettered legislative authority.

We have searched the entire Home Owners Loan Act of 1933 and find that the Act wholly fails to make any adequate statement of expressed congressional policy, as to the things enumerated in paragraph (d) above, to wit: "reorganization," "consolidation," "merger," "liquidation," "appointment of a conservator or receiver," "readjustment of capital," "release of control of an association."

In regard to the subject matters above enumerated, the Act wholly fails to set forth any standards, nor does it even purport to lay down a guide to administrative officers to enforce it in carrying out its mandate.

The Act wholly fails to provide for any notice for the doing of any of the enumerated acts, nor does the Act provide for hearings of any kind, nor does it require any findings of fact of insolvency, nor of imminent peril of insolvency, nor of imminent peril of any character. No findings of fact of any kind are required upon which to base the "board's" unfettered actions.

The Act wholly fails to provide any formula or criteria for determining for what, when, upon what basis, or in what manner, such rules and regulations, to be made by

the so-called "Board" (composed of one man), are to provide for the doing of any of the enumerated acts of:

1. Reorganization.
2. Consolidation.
3. Merger.
4. Liquidation.
5. Appointment of a conservator.
6. Appointment of a receiver.
7. Equitable adjustment of the capital structure.
8. Release from control.

The Act here in question attempts to delegate to the "Board" *Full Power* to provide in the rules and regulations for all of such matters and the legislative authority so attempted to be delegated is unfettered by any limitation whatsoever expressed in the Act.

The delegation of the legislative functions here attempted is far greater and much more "unfettered" than was the attempted delegation of legislative functions in the following acts, which have been declared unconstitutional as containing an improper and unlimited delegation of the functions reserved to the legislatures and Congress, to wit:

National Industrial Recovery Act, Sec. 9(c) (Hot Oil) Title I, 48 Stat. 195 (15 U. S. C. Title I 709(c)) was declared unconstitutional in part in the case of:

Panama Refining Co. v. Ryan, 293 U. S. 388 (1935), and the entire N. I. R. Act (48 Stat. 195) was declared unconstitutional in the case of:

A. L. A. Schechter Poultry Co. v. U. S. (May 1935), 295 U. S. 495, upon the ground that the Act (1935)

was an unconstitutional delegation of legislative powers to be exercised by the President in his unfettered discretion, even though the Act itself provided an expressed declaration of congressional policy, quoting from the Act in part as follows:

> "to remove obstructions to the free flow of interstate and foreign commerce . . . and to provide for the general welfare by promoting the organization of industry . . . and to maintain united action of Labor and Management . . . to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industry . . . to increase the consumption . . . by increasing purchasing power . . . to relieve unemployment . . . to improve standard of labor . . . to rehabilitate industry and to conserve natural resources." (p. 195.)

And the Act there was limited as to time of duration, *i.e.*, during emergency, but not to exceed two years (p. 196), and required the President to make a prior finding of fact that the "groups" have no limitations on membership and "are truly representative of such trades" and that the proposed Code (rule or regulation) will not "promote monopolies" and will tend to effectuate the "policy of this title" (p. 196) and the N. I. R. Act affords persons affected an opportunity to be heard "prior to approval by the President of such Code or Codes." (p. 196.)

The N. I. R. Act specifically "invested with jurisdiction" the district courts of the United States to restrain violations and delegated the prosecution thereof to the local United States District Attorney. (p. 196.)

The Act provided for investigation by the Tariff Commission and for public notice and hearing to be specified by the President, where foreign commerce was involved. (p. 197.)

The Act provided for "due notice and opportunity for hearing, for violations of the terms or conditions thereof", *i. e.* of licenses before suspension or revocation. (p. 196.)

Further the N. I. R. Act prescribed the conditions to be contained in the "Codes of fair competition" as to employes' hours and wages. (p. 198.)

The N. I. R. Act provided for investigation and hearing before fixing wages and hours codes. (p. 199.)

The N. I. R. Act, like the instant Home Owners Loan Act of 1933 delegated the authority to "prescribe rules and regulations" to the executive "to carry out the purposes" of the Act. (p. 200.)

Yet, in spite of this expressed though general statement of policy which was far more specific than in the instant act, and in spite of all of the standards, guides, notices and hearings, and opportunities to be heard, and even though the jurisdiction of the district courts was specifically set forth and conferred, which standards, guides, notices, hearings, and opportunities to be heard are absent from the instant act, the National Industrial Recovery Act was declared unconstitutional because of the "attempted delegation of legislative power." (*Schechter Corp. v. U. S.*, 295 U. S. 495 at 551.)

[See Appendix A.]

Agricultural Adjustment Act, 7 U. S. C. Sec. 608-609 (48 Stat. 31) (1933) was held unconstitutional in the cases of:

Butler v. United States, 78 F. (2d) 1 (1935), as this Act among other things "is an unwarranted delegation of the legislative power granted exclusively to Congress", and the case was affirmed in:

United States v. Butler, 297 U. S. 1 (1935).

Furthermore the A. A. Act was likewise and on the same ground held to be unconstitutional in:

Chester C. Fosgate Co. v. Kirkland, 19 F. Supp. 152 (1937 Florida).

and this ruling of the court was given in spite of and even though the A. A. Act provided a specific and extended:

(a) Declaration of Emergency, Sec. 1 (p. 31.)

(b) Declaration of Policy, Sec. 2,

and even though the Act did establish specific periods for basic prices (p. 32) and specified in detail the powers being delegated to the Secretary of Agriculture and did provide for notice and hearing *before* entering into marketing agreements (p. 34). and *before* suspending or revoking licenses did require due notice, hearing and findings. (p. 35.) The A. A. Act establishes a formula for determining the rate of tax (p. 36.) Furthermore the secretary is authorized: "to make such regulations . . . as may be necessary to carry out the powers vested in him by this title, . . ." [See Appendix B.]

None of the specified statements of policy, standards, formula, for determination of executive action, of the

Agricultural Adjustment Act declared unconstitutional can be found in the Federal Home Owners Loan Act of 1933, because neither standards, criteria nor formula are expressed therein. Instead, we find therein only a blanket delegation of legislative authority to make rules and regulations, to consolidate, merge, liquidate, etc., leaving thriving successful savings and loan associations subject only to the unfettered whims of the commissioner, the defendant appellant Fahey.

The Bituminous Coal Conservation Act of 1935, 49 Stat. 991, Ch. 824 was held to be unconstitutional in:

Carter v. Carter Coal Co., 298 U. S. 238 at p. 311 (1936).

In this legislation,

> "The delegation (of authority is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this Court, which foreclose the question. A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. at page 537, 79 L. Ed. 1584, 55 S. Ct. 837, 97 A. L. R. 947; Eubank v. Richmond, 226 U. S. 137, 143, 57 L. Ed. 156, 159, 33 S. Ct. 76, 42, L. R. A. (N. S.) 1123, Ann. Cas. 1914 B, 192; Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U. S. 116, 121, 122, 73 L. Ed. 210, 213, 214, 49 S. Ct. 50, 86 A. L. R. 654." (Interpolation added.)

Yet the Bituminous Coal Conservation Act sets forth a comprehensive declaration of necessity for the regulation (p. 991), established a commission of five members

to whom were delegated rule making powers "for carrying out the provisions of this Act" (p. 992), and specifically provided for the hearing of evidence and making findings of fact. (p. 993).

The Act even established an office of consumers counsel, to be appointed by the President, to present evidence on behalf of consumers, in matters pending before the commission. (p. 993.)

The Act further provided for establishment of schedules, (p. 996), promulgation of rules and regulations which may be appealed from districts to the full commission (p. 999), due notice and hearings in matters having to do with preliminary orders (p. 998), review of commission orders (p. 1001), findings of fact after notice and hearing (p. 1001-1002), cease and desist orders (p. 1002), and review by circuit court of appeals from commission orders (p. 1003). [See Appendix C.]

National Labor Relations Act, 29 U. S. C. A. Sec. 151 to Sec. 160 (e) of Act.

Enforcement was refused by the court in the case of:

National Labor Relations Board v. Prettyman, 117 F. (2d) 786 (1941 C. C. A. 6),

even though the Act of Congress itself provides for the finding of necessity, declares a definite policy (Sec. 151), grants to the board authority to make "rules and regulations" to carry out the provisions of the Act (Sec. 156), defines "Unfair labor practices" (Sec. 158), provides for "appropriate hearings upon due notice" and "petition for the enforcement or review of such order" (Sec. 159), provides for complaint for charge of unfair

labor practice and for notice, answer, hearing, provides that rules of evidence in courts of law, shall apply, provides for transcript of testimony, findings of fact, order, and for appeal to courts for review of order, etc. (Sec. 160) including other provisions to compel production of evidence and for process, subpoena, witnesses, and generally sets up in the Act itself, a comprehensive procedure.

Although the National Labor Relations Act has not been declared unconstitutional, as a whole; the court in the case of:

National Labor Relations Board v. Krettyman (supra),

did refuse to enforce the orders of the board, as the court indicated due process had not been sufficiently protected.

A comparison of the National Labor Relations Act with the Federal Home Owners Loan Act of 1933 quickly indicates how the instant act is entirely deficient and lacking in the safeguards of constitutional requirements, such as "due process."

Pennsylvania Public Service Company Law of 1913 (1913 Laws of Pennsylvania, p. 1375) would be unconstitutional if the interpretation of the state supreme court were followed, as it would then not provide adequate safeguards of the requirements of due process and would be an improper delegation of legislative functions, it was held by the case of:

Ohio Valley Water Co. v. Ben Avon, 253 U. S. 287 (1920),

even though the Act defines in great detail the scope of the definition of "Public Service Company" (p. 1375-

77 of Act), specifies their duties and liabilities (p. 1377) and the Act, within itself, provides that any company

> "aggrieved by any ruling, regulation, classification, or order which it is or has been required by the Commission to observe or to carry into effect . . . shall be entitled to a full and fair hearing and a speedy determination of its complaint on the merits. . . ." (p. 1387.)

The Act further creates the commission, provides who may sue or be sued (p. 1396), appoints counsel, provides for enforcement of commission orders through the courts (p. 1398), for hearings regarding complaints as to service, for rates, fares, tolls or charges (p. 1403) for holding public rate hearings upon "due notice" and with findings of fact required (p. 1415), allows a complaint to be filed with commission (p. 1416), covers the subpoenaing of witnesses, administration of oaths and taking of testimony. (Sec. 24, p. 1418.)

The Act further within itself provides completely for the "Practice and Procedure before the Commission and Upon Appeal" (Articles VI, p. 1420) and specially provides for appeal to "Court of Common Pleas of Dauphin County" (p. 1425) and to the supreme court (p. 1428), including provisions for injunctions. (Sec. 31, p. 1429.)

Yet, in spite of all these safeguards, because the state supreme court interpreted the Act as restricting the procedure for injunctions to that contained in the Act itself, the United States Supreme Court held the Act would be unconstitutional as a deprivation of due process, if so construed, and reversed the state supreme court's decision.

The lack of *any* safeguards of due process in the Federal Home Owners Loan Act of 1933 makes a comparison here almost ridiculous.

The Motor Vehicle Act of California Statutes 1919, p. 193 Deerings General Laws No. 5127, Sec. 22 (a) provided:

> "that the maximum rate of speed over any bridge . . . may be established by the state highway commission at less than the rate established by law, when in the judgment of said commission the safety of persons using the highway . . . shall be promoted thereby. . . ."

The constitutionality of the Act was attacked in:

In re McLain, 190 Cal. 376,

where the accused had been convicted of driving 28 miles per hour on the Colorado Street Bridge after the highway commission had set a maximum speed of 15 miles per hour.

Held: The section is unconstitutional and at (p. 381) the court stated:

> "Viewed as an attempt to legislate concerning the rate of speed for vehicles over the bridge as part of the highway, the declaration of the commission was without authority and void."

i. e. the delegation of power being illegal, the commission's action was void.

As in the instant Federal Home Owners Loan Act of 1933, there were almost no limitations upon the unfettered authority of the Commission to legislate speed limits.

California Vehicle Code, Sec. 147 on registration of out of state cars was held to be unconstitutional in the case of:

Asher v. Ingels, 13 F. Supp. 654 (D. C. Cal. 1936) (a three judge court).

The Act provided that the Motor Vehicle Department:

"in its discretion may grant a temporary permit to operate a vehicle for which application for registration has been made. . . ."

The three judge court held (p. 659) the section to be unconstitutional as permits were not granted as a matter of right.

"It may or may not be granted arbitrarily by the department of motor vehicles."

This is just another example similar to the instant act, where no restrictions, or guarantees of due process, were contained in the act, and hence it likewise was held to be unconstitutional.

Section 5066 of the Code of Iowa which granted rule making authority to the Highway Commission was held unconstitutional in the case of:

Goodlove v. Logan, 251 N. W. 39, 43 (1933) (Ia.), even though in the Act itself, it was provided that its purpose was to grant authority to the state highway commission "for the protection of the highways and the safety of the traffic thereon." The commission was limited in its scope to only those matters not otherwise covered by statute.

This unfettered delegation of legislative powers constitutes another example, like the instant case, of a too broad delegation of authority.

The State Aviation Act of New Jersey (Pamp. L. 1931, Ch. 190, p. 475) was held to be unconstitutional as being an unwarranted delegation of the legislative functions in the case of:

State of New Jersey v. Larson, 160 N. J. App. 556, 10 N. J. Mis. 384 (1932),

and this, even though the Act there provided at length as to its purposes, definitions (p. 475) for the making of air traffic as well as field rules for establishing standards (p. 477) and set forth specifically the powers and duties of the director. (p. 477.)

The Act provided further for enforcement by the district attorney through the courts (p. 478), the procedure for issuance of subpoenas and similar requisites for hearing procedure. (p. 478-479.)

The supreme court of New Jersey decided their citizens were entitled to have the safeguards of due process completely and fully set forth in the Act itself, yet the instant act provides neither safeguards, guides, standards, nor any of the requirements of due process for the protection of people of the entire United States.

Illinois Community Currency Exchange Act. (Ill. Rev. Stat. 1943, Ch. 16½, Par. 31.)

This Act was held unconstitutional in part by the case of:

McDougal v. Lueder, 389 Ill. 141,

as the Act delegated discretion to the auditor of public accounts, even though the Act provided:

Par. 40, that applicants must be vouched for by two reputable citizens of the state, that the individuals are personally known to be trustworthy and reputable, which the auditor must find, that they must have had certain business experience, a good business standing and reputation and are worthy of a license.

Further the Act provided that no application may be denied unless the applicant has notice of hearing on his application and an opportunity to be heard. In case of denial, the auditor must send the applicant a copy of his findings within 20 days thereof.

A review of any denial was provided for, to be had before certain courts, and paragraph 45 permits of revocation of license only on hearing before the auditor on ten days written notice, specifying grounds for the contemplated action, with the further requirement that the auditor must find one of authorized causes for revocation. There is also contained therein the further requisite for notice of revocation to licensee with findings and right of review before court.

The safeguards imposed in the Illinois Act, by comparison, make the rights of our Shareholder Members look naked in view of the many protections reserved to applicants and licensees in the Illinois Act as against none in the case before the court.

Yet, this Illinois Act was held unconstitutional on the ground that it gave too much authority to an administrative officer, without imposing sufficient safeguards.

The Liquor Control Act of Delaware, 91, 1943 was held unconstitutional in:

State v. Retowski (1934), 175 Atl. 325, 6 W. W. Harr 330,

even though the Act provided the commissioner might adopt and promulgate rules and regulations for the specific purposes therein set forth including:

> "An effective control of the business of manufacture, sale, dispensation, distribution and importation of 'Alcoholic Liquor', within and into the State of Delaware, including the time, place, and manner in which alcoholic liquors shall be sold and dispensed, non inconsistent with the provision of this Act."

The Act requires that the regulations made be published (Sec. 801, p. 103), further requires notice stating the cause for refusal of licenses (Sec. 21 p. 116), sets forth the grounds for such refusal of licenses (Sec. 22 p. 116 to 117), provides for an appeal to the courts (p. 117) enumerates the grounds for cancellation of licenses (Sec. 29, 120) and even covers enforcements by court order (Sec. 56 and 60, p. 142-143.)

Here again, even with all of the therein contained specific policies, standards, guides and criteria, since the Act did not within itself set forth the due process requirements of prior notice and hearing, it was declared unconstitutional as an unwarranted delegation of legislative authority.

By way of comparison and to an even greater degree, it is submitted that the Federal Home Owners Loan Act of 1933 fails to set forth any provisions for due process,

any standards or guides for the making of rules to govern the appointment of conservators and for the merging, consolidating and liquidating of associations *even though they be entirely solvent*, as is the situation before this court.

(f) Paragraph (d) of Section 5 of the Home Owners Loan Act of 1933, as Amended, Is an Incomplete and Void Attempt to Delegate Unfettered Legislative Authority and Is therefore Repugnant to the Constitution of the United States.

The plaintiff appellees here reiterate the contentions they made in the court below that this Act of Congress does not set up sufficient nor any guides, standards, policies, yardsticks, nor criteria sufficient to meet the constitutional requirements for the guidance of the so-called "Board", now consisting of the one man, the sovereign Fahey, defendant-appellant here.

In promulgating and enacting laws (without rules and regulations) in sub-division (d) of the Act "for the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association and to require an equitable readjustment of the capital structure of the same; and to release any such association from said control and permit its further operation," for the sake of brevity, we will adopt the use of the word "standard" as being inclusive of the various expressions used by courts in setting the rule down through the past more than one hundred years, wherein they have used such similar terms as "acts," "policies," "yardsticks," "consolidation," "criteria" and similar terms.

The question then presents itself as to what "standard" has Congress set up in the Federal Home Owners Loan Act of 1933, as amended, to limit the field or scope of enactments which Congress attempted to authorize the defendant-appellant Fahey here to enact. How much of the sovereign power of legislative enactment did Congress intend to delegate to Fahey? Was it a plenary power to enact any legislation that he might see fit in his omnipotent discretion to enact for the "reorganization, consolidation, merger, or liquidation of such association" and the appointment of conservators or receivers therefor and to readjust their capital structure and to release and permit them to continue their operations only if he, in his omnipotent wisdom should so see fit?

Just what standards or policy, if any, should govern the defendant-appellant Fahey here in the exercise of this sovereign right of enactment of law for the government of the approximately fifteen hundred (1500) federal savings and loan associations throughout the nation and their hundreds of thousands of shareholder members and their hundreds of millions of dollars of assets?

Does the Constitution of the United States authorize Congress to completely, and without reservation delegate away their responsibility of legislative enactment entrusted to them through the ballot box by the people of the United States?

We submit that the Constitution first enunciated and since the founding of our nation, the decisions thereafter, have consistently reiterated that Congress does not have authority to delegate away the unbridled authority for the enactment of legislation.

The defendant-appellants Fahey and Ammann suggest (1st) that the mere use of the words "conservator" and "receiver" (A. B. 59) gives a sufficient standard for the guidance of the sovereign Fahey and the enactment of legislation by him.

We respectfully submit and without intent to be facetious that the discharge of all of the loyal employees of the association and the causing of runs which have produced a net loss in the sixteen thousand (16,000) shareholder members savings accounts of approximately ten millions of dollars ($10,000,000.00), amounting to approximately forty per cent thereof, and the entangling of the titles to the approximately eight thousand (8,000) homes in Southern California and the beclouding of the titles to the homes of approximately eight thousand (8,000) Southern California residents, to say nothing of increasing the overhead for the operation of the association by approximately four hundred and twenty-five dollars ($425.00) per day, is hardly compatible with the words "conservator" or "receiver."

"Wherefore by their fruits ye shall know them." (Matthew 7:20.)

We submit one of the strongest implied connotations of the word "conservator" or receiver," at least to the lay general public is insolvency, or at least threat of insolvency. It has been admitted throughout this litigation that at least at the time of the seizure of the Long Beach Federal Savings and Loan Association on May 20, 1946, by the defendant-appellant Ammann that the association was solvent, with no threat of insolvency, and in fact had an undivided surplus and profits of approximately one million three hundred thousand dollars ($1,300,000.00).

The plaintiffs, the appellees here are, of course, unable to advise this honorable court as to the condition of the surplus and undivided profits, if any, of the association as of this time.

It is to be noted that the enactments of Congress cited by the defendant-appellants, such as the Bank Conservation Act of March 9, 1933 (Ch. 1, 48 Stat. 2, 12 U. S. C.) did not attempt to delegate the power to enact legislation, but rather set up within the act itself appropriate provisions for the appointment of conservators, even providing within the Act itself the conservators duties, powers, expenses, limitation of salaries (Sec. 203) and provides specifically for the termination of such conservatorship (Sec. 205) and for the reorganization of banks (Sec. 207), specifically setting forth therein provisions that such reorganization shall satisfy the Comptroller of the Currency as to its being fair and equitable to all depositors, their creditors and stockholders and provides in the procedure for such plans of reorganization, for reasonable notice, the percentage of depositors and creditors necessary to join in such reorganization plans and similar statutory procedural requirements and permits the "Comptroller of the Currency" only the authority to make rules and regulations necessary to carry out the specified provisions of the Act. The Bank Conservation Act of March, 1933, *supra*, contained guides standards and procedures in the law itself. No attempt therein was made to delegate legislative functions. Other acts mentioned by defendants-appellants counsel fall into the category of enactments by Congress of specific provisions with adequate standards provided within the acts themselves, such as the Bank Act of 1933 (Act of June 16,

1933, Chap. 89, Sec. 31, 48 Stats. 162, 194, 12 U. S. C. 71(a)) enacted by Congress itself, which specifically provides:

> "The Board of Directors, Board of Trustees, or other similar governing body of every national banking association and of every state bank or trust company, which is a member of the federal reserve system shall consist of not less than five, nor more than twenty-five members. If any national banking association violates the provisions of this section and continues such violation *after thirty days notice*, from the Comptroller of the Currency, the said Comptroller may appoint a receiver or conservator therefor in accordance with the provisions of existing law." (Emphasis added.)

This is a good example of a specific standard specifically set forth within the act itself by the enacting Congress for the guidance of the Comptroller of the Currency to aid him in administering the provisions of the Act of Congress.

Similarly the National Housing Act (Act of June 27, 1934, Chap. 847, Sec. 406, 48 Stats. 1246, 1259, 12 U. S. C. 1729), specifically provides within the enactment of Congress, Section 1729, Subdivision (b).

> "In the event that a federal savings and loan association *is in default*, the corporation shall be appointed as conservator or receiver and is authorized as such (1) to take over the assets of and operate said association, (2) to take such action as may be necessary to put it in a sound and solvent condition, (3) to merge it with another insured institution, (4) to organize a new federal savings and loan association to

take over its assets, or (5) to proceed to liquidate its assets in an orderly manner, whichever shall appear to the best interests of the insured members of the association in default." (Emphasis added.)

Again we say that in this Act, Congress specifically set forth the instance to-wit, "when the association is in default" as the standard to be first observed before further action could be taken: In the instant litigation, comparable action could not be taken until insolvency, irrespective of what may have since transpired under the management of the so-called conservator. The Long Beach Federal Savings and Loan Association was admittedly NOT IN DEFAULT.

The defendant-appellants next suggest that the doctrine of equity receivership will supply the standards for limitation of the delegation of the unbridled legislative functions which limitation Congress omitted to place in Section 5(d) of the Home Owners Loan Act of 1943, as amended. Defendant-appellants indicate the distinguishing factor which makes the equity receivership doctrine inapplicable to supply the constitutional deficiency of Section 5(d) of the Home Owners Loan Act of 1933, when they state at page A. B. 67:

"If Section 5(d) had merely authorized the bank administration (now consisting of one man, the defendant-appellant John H. Fahey) to apply to a court of competent jurisdiction for the appointment of a receiver or conservator, we have no doubt that neither appellees nor the District Court would have seen any constitutional objection. No claim of unlawful delegation of legislative power would have been made." (Interpolation in parentheses added.)

With this proposition, we are able to concur. If Section 5(d) had provided that Mr. Fahey, the defendant-appellant here, either individually or acting as the bank administrator should be required to proceed in an orderly manner to present the situation to a court of competent jurisdiction, there can be no doubt that the requirement of presentation to court would have met the constitutional requirements of due process, and since the court would have followed the law and applied the rules of equity before appointing a receiver and would not leave enacted a law, there would have thus existed no unlimited delegation of unfettered legislative authority.

Counsel suggested that

> ". . . it should not taint the statute with invalidity that in this instance Congress vested the authority in an administrative official rather than a court." (A. B. 68.)

The distinction which counsel either inadvertently or blindly declines to see is that Congress does not either here or otherwise vest the court with authority to enact legislation, whereas the provisions of Section 5(d) of the Home Owners Loan Act of 1933, as amended delegate and would "vest" the authority to enact legislation in the administrative official. The courts themselves, and especially this Court is and always has been most careful to refrain from judicial legislation. Even in the case cited by defendant-appellants, *Intermountain Rate Cases*, 234 U. S. 478 (1939), Mr. Chief Justice White in delivering the opinion of this court reiterated the principle again as follows:

> "In any event, however, we must be governed by the statute and its plain meaning."

Since it has been mentioned, it should be pointed out even in the *Intermountain Rates Cases, supra,* the court recognized the general rule that an unlimited delegation of legislative power, without standard fixed by Congress within the Act itself would be repugnant to the Constitution, but held the rule was inapplicable in that case which had to do with an amendment to an act to regulate commerce involving its long and short haul provisions whereby the Commission had to determine the dissimilarity of circumstances and then justify a deviation from the rate provisions of the long and short haul clause which power was by said amendment transferred from the carriers themselves to a public administrative body. Again this was a delegation by Congress to others of the duty to find a factual situation rather than a delegation by Congress of this power to enact legislation. If Section 5(d) of the H. O. L. Act had directed the defendant-appellant Fahey to present the matter to the appropriate court before seizing and at least partially destroying the association, we would have no quarrel with the constitutionality of the section, but, as expressed so aptly in the recently decided case of *U. S. v. United Mine Workers, et al.*, March 6, 1947, October Term, 1946, Nos. 759, 760, 781, 782, and 811, "No one, no matter how exalted his public office or how righteous his private motive, can be judge in his own case. That is what courts are for."

State rules regarding the appointment of conservators are as suggested by the appellants, of interest. It is hard to conceive how they can supply the constitutional deficiencies of regulations and standards in Section 5(d) of the H. O. L. A. as it must be borne in mind that with 48 different states it is entirely conceivable that there might

well be 48 different standards, so called, some of which might be entirely satisfactory, while others might be as barren of constitutional safeguards as is Section 5(d) of the H. O. L. A. itself.

Furthermore the court's attention is respectfully directed to the fact that the State laws governing the appointment of receivers, conservators, liquidators of State-regulated building and loan associations are *laws* which have been enacted by duly constituted state legislators presumably, at least, acting within their legislative province and performing their legislative functions for which they were duly elected by the sovereign people of their respective states.

State laws are not "State rules" as artfully suggested by counsel for the defendant-appellants at page A. B. 68.

Since such state *laws* usually and customarily do "provide an extensive and detailed system of guidance and control for the state administrators, it follows that such extensive and detailed system of guidance would in itself constitute proper standards contained in such state laws for the guidance of officials in the determining of facts and in the making of administrative procedural detailed rules. This is the basis upon which most of such state laws governing the appointment of such conservator, receiver, liquidator, for such state regulated building and loan associations have been held constitutional.

The theory that Congress specifically or by implication incorporated such state laws by reference into the provisions of Section 5(d) of H. O. L. A., is untenable, for, were that to have been the intention of Congress, we would, in each instance, be met with the question, which of the 48 state laws were so incorporated by ref-

erence to Section 5(d) of the H.O.L.A.? Or would it be contended that all 48 state laws were so incorporated by reference?

If it is contended that the state laws of each individual state are incorporated by reference or by implication, then, it would follow that there would be a different set of laws determining when a conservator was to be appointed or an association was to be merged, or dissolved, or liquidated in each of the 48 different states.

And furthermore what would be the procedure in such states as might have no state laws upon the subject of merger, liquidation or consolidation or the appointment of conservators? In such states would the defendant-appellants, the sovereign Fahey, have the right to enact his own unlimited, unfettered laws according to his own caprice or whims without any standards being imposed upon him by the congressional enactment of Section 5(d), H.O.L.A., as to when to appoint a conservator, receiver, or upon what grounds, or to dissolve, or to liquidate, or to merge, or reorganize a federal savings and loan association.

In Section 5(d) of the H.O.L.A. to be deemed constitutional in those states which have substantive laws providing adequately to meet the constitutional requirements and to be deemed unconstitutional in those states which have no, or only inadequate, enactments on the subject of conservators, receivers and merger, etc. The mere statement of such propositions is sufficient to show that the incorporation of the state laws could not have been the Congressional intent. The fiats enacted by the defendant-appellant, Fahey, disclose no serious attempt on his part to issue edicts in conformance with the local state

laws on any subject regulating building and loan and savings and loan associations.

The California Building and Loan Association Act, #986 of Deering's General Laws of the State of California (of which the defendant-appellants cite only Section 13.11) specifically provides in the next Section, 13.12, for an application to the Superior Court of the state by the aggrieved association within 30 days after any seizure, and that upon such application, the Superior Court "after citing the commissioner to show cause why further proceedings should not be enjoined, and hearing the allegations and proofs of the parties, and determining the fact, may upon the merits dismiss such application *or enjoin* the commissioner from further proceedings and direct him to surrender such business, properties, and assets to such association. An appeal from such judgment enjoining the commissioner from further proceedings and directing him to surrender such business, property, and assets to such association shall *not* operate as a stay thereof, unless the trial court in its discretion shall so order . . ." [See Appellees' Appendix D.]

It is further interesting to note that under the California statutes, enactments of the California legislature, not so-called rules or regulation, the California legislature has specifically set forth in detail the basis upon which the commissioner is authorized to take possession of such association and they have required as a prerequisite to any such taking of possession that the commissioner make a specific finding. By the inclusion in the Building and Loan Association Act of the State of California, *supra*, of a complete plan and procedure for the regulation and operation of state building and loan association and the

taking possession of the assets of such association after a finding of the existence of grounds specified by the legislature, the California legislature performed its legislative function and did not unlimitedly delegate an unfettered legislative power to enact loss by fiat and edict as was done by Section 5(d) of the H.O.L.A.

A further reason for the constitutional prohibition against permitting the legislature to delegate its legislative function is that the standards by which the administrator should be governed in the making of rules of procedure should be specifically set forth in the enactment itself, in order that the people to be governed as well as the administrator governing them may know what are the standards and limitations as to his rule making authority.

The defendant-appellants next argue that the standards for administrative action "need not be tested in isolation." They derive much meaningful content from the purpose of the Act, its factual background, and the statutory context in which they appear quoted from *American Power and Light Company v. Securities & Exchange Commission*, this term, 4 and 5 cited November 25, 1946, slip opinion, page 10. In this quotation the defendant-appellants start too late and stop too soon, for in order to obtain the full true meaning of the court's opinion it is necessary to consider at the same time preceding and succeeding passages thereof. The complete context on the subject is as follows (91 L. Ed. Adv. Op. 89, at 98):

> "These contentions are without merit. Even standing alone, standards in terms of unduly complicated corporate structures and inequitable distributions of voting power cannot be said to be utterly without

meaning, especially to those familiar with corporate realities. But these standards need not be tested in isolation. They derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear. See Intermountain Rate Cases (United States v. Atchison, T. & S. F. R. Co.), 234 U. S. 476, 58 L. ed. 1408, 34 S. Ct. 986. From these sources—from the manifold evils revealed by the legislative investigations, the express recital of evils in §1 (b) of the Act, the general policy declarations of Congress in §1 (c), the standards for new security issues set forth in §7, 15 U. S. C. A. §79g, 4 F. C. A., Title 15, §79g, the conditions for acquisitions of properties and securities prescribed in §10, 15 U. S. C. A. §79j, 4 F. C. A., Title 15, §79j, and the nature of the inquiries contemplated by §11 (a)—a veritable code of rules reveals itself for the Commission to follow in giving effect to the standards of §11 (b) (2). These standards are certainly no less definite in nature than those speaking in other contexts in terms of 'public interest,' 'just and reasonable rates,' 'unfair methods of competition' or 'relevant factors.' The approval which this Court has given in the past to those standards thus compels the sanctioning of the ones in issue. See New York Cent. Securities Corp. v. United States, 287 U. S. 12, 24, 25, 77 L. ed. 138, 145, 146, 53 S. Ct. 45; Yakus v. United States, 321 U. S. 414, 419-427, 88 L. ed. 834, 845-848, 64 S. Ct. 660, and cases cited."

It will be seen from the foregoing comparative table herein (*supra* pp. 73 to 83) which compares the Public Utility Holding Company Act and the Act now under attack that congress provided extensive and comprehen-

sive statements of legislative policies, standards and provisions for due process the Utility Act, but the Home Owners Loan Act of 1933 is barren of any such. In the Public Utility Holding Company Act these various provisions furnish standards in the express language of the statute to guide administrative actions.

The reasoning in the foregoing case is clearly applicable to the instant act which is unconstitutional as a delegation of legislative power to defendant-appellant Fahey, because of an absence of ascertainable standards for guidance in carrying out its functions.

The thorough searching by, defendant-appellants of the Home Owners Loan Act for any ascertainable standards to meet the constitutional requirements of a specification of legislative policy and standards and to provide the safeguards of due process has led them to suggest numerous provisions which are totally inapplicable for use as standards for the guidance of the administrator in enacting rules and regulations for reorganization, consolidation, merger, or liquidation, or appointment of conservator or receivor for such association.

Does this Court feel that methods by which an association may raise its capital, or by which it shall lend its funds, or provisions for that membership in a federal home loan bank or provisions for issuance of subscriptions to preferred shareholders, or that provisions for exemption from taxation or provisions to act as a fiscal agent of the United States have anything to do with the reorganization, consolidation, merger or liquidation of federal savings and loan association? Or with the powers to appoint a conservator or receivor thereof, or to require equitable readjustment of the capital structure of the

same? Or with the provisions concerning the release of such association from control and permission for its further operation? The criteria, standards and guides of Section 5(a) are different in conception from the legislative enactments permitted to be made under Section 5(d).

The Court's attention is directed to the fact that subsection (d) of Section 5 is a section which has to do with the "reorganization, consolidation, merger or liquidation of such association, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same;" thus this section has to do with the change, alteration, merger, consolidation or termination of such associations, whereas in subsection (a) of Section 5 are included provisions having to do with rules which concern the "organization, incorporation, examination, operation and regulation of associations" provisions which deal with bringing such organizations into being, and their maintenance. Thus we find a distinct cleavage between the purposes of these two subsections. Both contain words delegating to the board, the power of legislative enactment.

Any words of limitation, criteria, policy, which might be deemed to set forth statutory standards or declarations of policy found in sub-division (a) are by their very nature directed to the delegation of legislative authority found in sub-section (a) to wit; for the purpose of creation and maintenance of the association and are inapplicable to subdivision 5(d) wherein are found provisions dealing with termination of the life of such associations and not the origin or continuity thereof.

The omission from sub-division 5(a) of any mention of a power to make rules and regulations for "the reorganization, consolidation, merger or liquidation of such association, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation" is a clear indication of the legislative intent of Congress that enactment of rules and regulations for such purposes was not within the purview of sub-division 5(a) under the well known rule of *"expressio unius est exclusio alterius."*

Had it been the intention of Congress that the language of sub-division 5(a) should be applicable to sub-division 5(d) there would have been no necessity for making a separate sub-division 5(d), but rather the listing of the items of sub-division 5(d) reorganization, consolidation, merger or liquidation, etc., could have more easily been included within sub-division 5(a).

Section 5(d) being a delegation of authority to enact "rules and regulations" for the deprivation of property, title, possession and other incidents of ownership in order to meet constitutional standards is required to have:

1. Adequate safeguards, criteria, limitations or statutory standards or a declaration of policy;

2. And also must have adequate provisions to meet the constitutional requirements of due process.

It is submitted that this enactment, to wit, sub-division 5(d) is totally lacking in both these vital requirements.

Had Congress seen fit to include within Section 5(d) or in any other appropriate manner in the H. O. L. A. criteria to serve as a standard for the enactment of legislation by the *administrator* for the appointment of conservators, receivers or for the dissolution, liquidation, merger, reorganization, consolidation, etc. of Federal associations, it is submitted that this association in the instant action would have satisfactorily passed such test so as to make the appointment of a conservator unjustifiable.

The best practice in the State of California would be for the defendant-appellant Fahey to have proceeded by appropriate court action, rather than by direct seizure without notice, hearing findings or any other due process.

The character and responsibility of the management is evidenced by their accomplishments in the past twelve (12) years in having developed this association from its humble beginning of $7,500 of deposits to a twenty-six million dollar ($26,000,000.00) solvent institution when seized, and its usefulness and success in the community is manifest in the confidence of its sixteen thousand (16,000) shareholder members and the safety of the institution from the investors' view point is best proved by its financial statement at the time of the seizure showing not only no impairment of capital, but actually an admitted surplus and undivided profits of approximately one million three hundred thousand dollars ($1,300,000.00). The consistency of the association's very same management in having continuously paid dividends of from two and a half to four per cent for the past twelve (12) years, and the soundness of its home financing policy has resulted in

its having diversified its loans among some eight thousand (8,000) satisfied borrowers.

Defendant-appellants next suggest that the constitutional requirements that the act provide a "standard" to safeguard delegation of legislative authority can be supplied by reference to a vague, nebulous conglommeration of *quasi* facts which they designate as the background of the act. As to matters of interpretation and to aid the courts in garnering the proper connotation of particular words and expressions, it has, of course, long been the practice to seek aid from Congressional statements made during the enactments of legislation where the language within the act itself is obscure.

The term "standard" is herein used for the sake of brevity to include all of the expressions such as "criteria", "yardsticks", "legislative policy", "canalizing", "framework", and "guides".

The absence of constitutional requirements of a statement of legislative policy and standards, and the safeguards of due process, cannot be added to the statute by defendant appellants' adroit attempt to incorporate into the statute itself, by implication and innuendo, matters not in the act and not even in the record.

Such rules of interpretation cannot add missing language to a statute barren of these constitutionally required safeguards. Even emergency legislation required by extraordinary conditions does not justify violation of the fundamental constitutional requirements as was readily admitted by Mr., the then Solicitor-General, Reed in his argument to this court in 1935 in the case of *U. S. v. Butler, et al.*, 297 U. S. at 4, wherein he quoted from the

opinion of this court in the case of *Home Building & Loan Assn. v. Blaisdell*, 290 U. S. 398 (1932):

> "... extraordinary conditions may call for extraordinary remedies; but, as the Court has said, 'the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power'."

That this court will not ignore the plain meaning of a statute in order to avoid a decision upon its constitutionality and validity has already been enunciated by this court in passing upon and declaring unconstitutional Section 5(i) of this same act, the Federal Home Owners Loan Act of 1933 as amended, in the case of *Hopkins Savings Association v. Cleary*, 296 U. S. 800 (1935), at p. 315, wherein the court stated:

> "'But avoidance of a difficulty will not be pressed to the point of disingenious evasion.' Moore Ice Cream Co. v. Rose, supra (289 U. S. 373): 'Here the intention of the Congress is revealed too distantly to permit us to ignore it because of mere misgivings as to power' Ibid. The problem must be faced and answered." (Citation inserted.)

and further, at page 338, Mr. Justice Cardozo states:

> "The power of Congress in the premise, if there is any, being not exclusive, but at most concurrent, and the untrammeled coexistence of federal and state associations being a conceded possibility, we are constrained to the holding that there has been an illegitimate encroachment by the government of the nation upon a domain of activity set apart by the Congress as the province of the states. Cf. Linder v. U. S., 268

U. S. 5, 17; U. S. v. Dewitt, 9 Wall 41, 45. The destruction of associations established by a state is not an exercise of power reasonably necessary for the maintenance by the central government of other associations created by itself in furtherance of kindred ends."

The differentiation between the delegation of legislative function and the delegation by a legislative body to an administrative official of the duty of administering an enactment is succinctly expressed in the case cited by defendant-appellants, of *People ex rel Barrett v. Logan County Building & Loan Assn.*, 369 Ill. 518, at 526, as follows:

> "The basic distinction is between a delegation of power to make the law, which involves the discretion as to what the law should be, and conferring the authority or discretion as to its execution, to be exercised under and conformable to the law. The first cannot be done; the latter is unobjectionable. I Lewis' Sutherland on Stat. Const. (2d ed.) sec. 88; City of Chicago v. Alpert, Inc. supra.)"

In holding that certain sections of the New Jersey Building and Loan Association Act which, in detail and at considerable length, "prescribed the method and order to be applied by building and loan associations for the payment of maturities and withdrawals, . . ." were constitutional, the Supreme Court of the State of New Jersey in the case of *Veix v. Seneca Building and Loan Assn.*, 126 N. J. L. 314 (1941), again reiterated the general rule at 321:

> "The legislature may neither abdicate, nor transfer, nor assign nor delegate to others its exclusive function to make the law. But the legislature may

> select or delegate to, some governmental instrumentality or agency or public official, the power, or function, to make findings and fact or to make subordinate rules, or orders, or both, *within the defined standards and policies prescribed by it.* (Citing many cases.)" (Emphasis added.)

Furthermore, this Court, in reversing the Supreme Court of Louisiana and holding that certain provisions of a Louisiana Building and Loan Association Act, Number 140, are unconstitutional as being repugnant to the Constitution of the United States in the case of *Treigle v. Acme Homestead Association*, 297 U. S. 189 (1936), states at 197:

> "The legislature has no greater power to interfere with the private contracts of such corporations, or the vested rights of their stockholders as such, under the pretext of public necessity, than it would have to attempt the same ends in the case of a private corporation. Though the obligations of contracts must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper exertion of the power, it must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive."

It should be borne in mind that there was no so-called governmental money of any kind in the admittedly solvent Long Beach Federal Savings and Loan Association, when it was seized on May 20, 1946 by the defendant appellant Ammann, the minion of the defendant-appellant sovereign Fahey, without any prior request for correc-

tion of even imaginary improprieties, without any notice, without hearing or opportunity to be heard, although its 16,000 shareholder members were thus deprived of their right of possession, control and management of their own twenty-six millions of dollars in assets. This twenty-six millions of dollars, including the approximately $1,300,000.00 of surplus and undivided profits [R. 221], represented the savings of approximately 16,000 shareholder members of the Association who were its sole mutual owners.

Neither the defendant-appellant sovereign Fahey nor his nominee, the defendant-appellant Amihann, owned nor had any right, title or interest in and/or to any of the assets of this Association.

The entirely solvent Federal Home Loan Bank of Los Angeles and its approximately forty-three millions of dollars in assets, including nearly $2,000,000.00 of surplus and undivided profits, having likewise been seized without warning, notice, hearing or opportunity to be heard, less than sixty days before, and all of its assets without the consent of any of its stockholders and this institution having been instantaneously and summarily without warning, notice or hearing, dissolved, liquidated, merged and consolidated with the Portland Bank, so that their funds and assets were commingled and then moved to the San Francisco Bank over 400 miles away, and the name of the consolidated institution having been changed to the Federal Home Loan Bank of San Francisco by fiat [R. 26, 291] of the defendant appellant sovereign Fahey, all within one day, there were grounds for the reasonable fear on the part of 16,000 shareholder members and their duly elected officers of the Long Beach Association that they would

be accorded similar treatment and likewise be destroyed forthwith.

This, no doubt, would have occurred, but for the prompt intervention by the United States district court which by the immediate issuance of its restraining order prevented such action.

It can hardly be denied that a seizure followed by consolidation, merger or liquidation or other transferring and commingling of the assets of the association with the funds of some unknown association located in some foreign city or even states under the direction of a totally new, strange or different management which may institute strange and unusual rules and regulations governing all of the various detailed phases of the operation of the building and loan association, certainly would constitute a deprivation of some of the incidents of ownership of property.

A merger of this entirely solvent association, with an insolvent association might well not only consume the substantial one million three hundred thousand dollars ($1,300,000.00) surplus and undivided profits this association had when seized, but might even result in the combined commingled associations being themselves insolvent.

Fantastic though this suggestion may seem, it is not outside the realm of probability, when viewed against the background of what had already been so recently accomplished by this same defendant-appellant, the sovereign Fahey, in the seizure, dissolution, merger and scrambling of the Los Angeles and Portland Banks into the so-called San Francisco Bank.

It can hardly be said that the seizure of this solvent association which resulted in a net reduction in the shareholder members savings investments of approximately forty percent, or nearly ten millions of dollars ($10,000,000.00), and which beclouded and entangled the titles to some approximately eight thousand (8,000) parcels of southern California real property, was conducive to the purpose of providing "for the financing of homes" so greatly needed by veterans and other citizens of southern California at that time.

In the circuit court's opinion in *Butler v. United States*, 78 F. (2d) 1, which the Supreme Court affirmed in *Butler v. United States*, 279 U. S. 1 (1938), in declaring Sections 608 and 609 of the Agricultural Adjustment Act unconstitutional, because of the attempted improper delegation of an unfettered legislative power to the Secretary of Agriculture without a sufficient protective statement of policy and standards the court commenting upon what should be contained in such standards, stated:

> "The Powers to determine what the law shall be, what property shall be affected by taxation or regulation and what standards shall govern the administrative officers in administering acts of Congress has never been held to be an administrative function. The Power to impose a tax and to determine what property shall bear the tax can only be determined by the legislative department of the government. *If Congress undertakes to lay down a guide for administrative officers to enforce in carrying out its mandate, it must be an intelligible and a reasonable definite standard.*" (Emphasis added.)

As suggested by this court in the case of *Schechter Corporation v. United States*, 295 U. S. 495 (1934) at page 530,

> "Accordingly, we look to the Statute to see whether Congress has overstepped these limitations,—whether Congress in authorizing 'codes of fair competition' has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others."

What standard within the Act limits the unfettered legislative power reposed in the defendant-appellant sovereign Fahey to issue fiats and edicts for the termination of solvent, successful, well managed federal savings and loan associations?

Competitive financial lending agencies might welcome the suggestion implied in defendant-appellants brief at page 80, that the standards for establishment, insufficient though they may be, to the effect that associations can only be esablished if this could be done "without undue injury to properly conducted existing local thrift and home financing institutions" should be applied to the termination of such associations by way of merger, consolidation, liquidation dissolution or otherwise. Were such an interpretation to be adopted, if competition became keen and the competitor had political influence, such competition might be effectively stopped by prevailing upon the omnipotent sovereign Fahey to issue his edict and fiat to dissolve, liquidate or otherwise terminate the existence of such successful competition.

To permit such rule by edict and fiat would not be consistent with the fundamental American concept that ours is

"A Government of laws, and not of men."

The attack here is for the purpose of disclosing the unconstitutionality of Section 5(d) of the Home Owners Loan Act of 1933, as amended. The appellees concede this constitutes an attack upon an "Act of Congress" upon the ground that "such act or any part thereof is repugnant to the Constitution of the United States", as said act does not set up sufficient standards, guides, policies nor any yardstick for the guidance of the so-called "board" (Consisting of one man, the sovereign John H. Fahey) in promulgating rules and regulations "for the reorganization, consideration, merger or liquidation of such associations, including the power to appoint a conservator or a receiver to take charge of the affairs of the association. . . ." (Sec. 5(d) H. O. L. A.)

What standards are to guide the commissioner in enacting his edicts for the appointment of conservators, and for the determination of which associations shall be "merged" with which other associations?

Is it a question of solvency, insolvency, good management, or bad mangement?

Should well managed associations be merged with poorly managed associations?

Should insolvent associations be merged with solvent associations?

Is it a matter of locality—are associations of adjacent territories to be merged?

Is it a matter of the economic conditions of the locale where such associations are located?

Is it a question of economic need for such associations that justify their merger with each other?

Is it a question of merging associations from areas where they are not economically needed?

Is it a question of dissolving associations to stifle competition?

Is it a question of merging associations to create affective monopolies?

Is it a question of political expediency, associations having officers of one political faith to be merged with associations having officers of the same political faith, or, on the contrary, having officers of a different political faith?

Is the determination as to what associations are to be merged to be determined by the religious beliefs of the shareholder depositor members?

Is it a question of the personalities of the officers of such associations?

Does the Act of Congress, as appears to be the case here, leave it entirely up to the Federal Home Loan Bank Board—now controlled, operated and directed by one man only, the defendant-appellant, the sovereign John H. Fahey—to follow his whims unrestrainedly and unfettered by any expressed congressional policy as to which associations shall be reorganized, dissolved or liquidated and which associations shall be merged or consolidated with which other associations, if any?

What is the reason? Possibly the determining fact might be, as expressed by the court below,

". . . because the wind today is blowing from the north." [R. 699.]

II.

Enactments Which Permit the Taking, Seizing or Deprivation of Property Without Due Process of Law Are Repugnant to the Constitution of the United States and the Government.

(a) The 4th and 5th Amendments of the Constitution of the United States Prohibited the Enactment of Legislation Which Permits the Seizure, Taking or Deprivation of Property Without Due Process of Law.

"Amendment IV. Section 1. *The right of the people to be secure* in their persons, houses, papers and effects, *against unreasonable* searches and seizures, shall not be violated, and no warrants shall issue but upon reasonable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized." (Emphasis added.)

"Amendment V. Section 1. *No person shall be* held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal cases to be a witness against himself; nor be *deprived* of life, liberty, or *property, without due process of law*; nor shall private property be taken for public use without just compensation." (Emphasis added.)

(b) A Conservator's Seizure of the Assets of an Association and Dispossession of Its Duly Elected Directors and Officers From the Management and Control of Its Property, Constitutes a Deprivation of That Property From the True Owners, the Shareholder Members.

A mere reading of Section 5(d) of the Home Owners Loan Act of 1933, as amended, discloses that it is entirely barren of any provision or requirement that the laws which the board, now consisting of the one man, the defendant-appellant Fahey is authorized to enact shall provide any safeguards or protectives for due process, and therefore by such omission of the required constitutional guarantees of due process, permits the enactment of laws by the so-called board for the seizure from the rightful owners, and thereby depriving them of property without due process of law.

The taking, seizing, transferring, consolidating and merging of the assets consisting of all of the property of various kinds and of various federal financial institutions and transporting the ownership of such property to other locations, even out of a state and back into a state again and scrambling such assets and property, changing them from one form of property into another, delivering the direction, control and management of such property to new and different persons, directors and officers not selected by or elected by the owners of the property as was done by the defendant-appellant Fahey and his minions in the prior seizure of the entirely solvent Los Angeles bank and its assets and commingling them with the Portland, Oregon Bank and its assets into the so-called San Francisco, California Bank under the management and control of totally different directors and officers not selected by nor elected by the owners of the property, part of whom

were the sixteen thousand (16,000) shareholder members represented by the plaintiff-appellees herein, clearly indicates that the defendant-appellant Fahey, himself, at least deemed that Congress had delegated such omnipotent authority to him.

It can hardly be questioned that this was a violation of the right of the people to be secure against unreasonable seizure and constitutes a deprivation of property without due process of law. Had not the District Court of the State of California in and for the Southern District, acted promptly and issued its restraining order upon the request of the plaintiff-appellees, the Long Beach Federal Savings and Loan Association, in all probability would have suffered the same fate as that accorded the Los Angeles Bank by the sovereign, dictator, the defendant-appellant Fahey.

No part of the approximately one million three hundred thousand dollars ($1,300,000.00) of surplus and undivided profits admittedly existing at the time of seizure has ever been returned to the approximately sixteen thousand (16,000) shareholder members of the association, and those whom the defendant-appellant A. V. Ammann acting as the so-called conservator had succeeded in frightening into withdrawal of their savings from the association have not received any part or portion of the undivided surplus and profits which belong to them. While this may be comparatively a small sum, nevertheless to those residents of southern California who have withdrawn forty per cent (40%) or nearly ten millions of dollars ($10,000,000) of their savings investments from the association. This forty (40%) per cent of the surplus and undivided profits of approximately five hundred twenty thousand dollars ($520,000.00) constitutes a sizeable

deprivation of their property without due process of any process of law.

As expressed by Mr. Justice Cardozo in his concurring opinion in the case of *Schechter Corporation v. United States, supra,*

> "The Statute however, aims at nothing less, *as one can learn* both from its terms and from the administrative practice under it." (Emphasis added.)

or as indicatively expressed by the colloquialism "The proof of the pudding is in the eating."

In 1934, when the Long Beach Federal Savings and Loan Association was organized, the rules and regulations which had been adopted by the five man non-political board provided that the board before making of findings that the interests of creditors or shareholders were being jeopardized, or that the business was in an unsafe condition or if the association had suspended payment of its obligations and under various other conditions, the five man non-political board might take certain actions, including it might appoint a conservator, and as to that subject the board's rules and regulations then specifically provided that

> "It will not be the policy of the board except in extraordinary circumstances to exercise such power without giving the institution an opportunity to be heard." [R. 281, Section 45 Rules and Regulations for Federal Savings and Loan Associations, enacted June 13, 1933.]

Likewise in such rules and regulations, the five man non-political board created by Congress had adopted, effective in October, 1934, provisions for an automatic hearing upon a ten days notice "mailed to *all shareholders*,

borrowers and creditors of the association" providing them an opportunity to be heard in regard to any seizure by any conservator. [R. 282—Section 46 Rules and Regulations Federal Savings and Loan Associations.]

A little bit later the board still composed of five (5) members took the next step and on December 1, 1936, adopted Revised Rules and Regulations, which, among other things, deleted the statement of policy of the board in regard to giving institutions an opportunity to be heard before exercising of powers if they had any, to seize such an association, as set forth in Section 45, *supra*, and in lieu thereof provided that

> "*Before the appointment of a conservator or a receiver, the federal association will be given an opportunity to be heard*; provided, however, that the Board may appoint a temporary conservator pending such hearing." (Emphasis added.) [Section 5](c) Revised Rules and Regulations of Federal Savings and Loan Associations, effective December 1, 1936, R. 282.]

Similar provisions for the giving of notice to shareholders, borrowers and creditors and affording them an opportunity to be heard regarding such seizure were reenacted in the Revised Rules and Regulations to the five man non-political board, adopted December 1, 1936. [Section 52 thereof, R. 282.]

Later the Federal Home Loan Bank Board, then still consisting of five non-political members was consolidated with the National Housing Association by Executive Order No. 9070 effective February 24, 1942 [R. 282] and from this consolidation, the defendant-appellant Fahey emerged as the commissioner and the sole and only re-

maining member of the so-called Home Loan Bank Board, and ever since he, as conservator has assumed the sovereign powers and policies of the so-called board.

The next step was the adoption on August 15, 1943, by the Board, now composed only of the defendant-appellant Fahey, of a revised set of rules and regulations of federal savings and loan associations, which provided among other things that whenever in the opinion of the one man board, any association was guilty of any of the offenses listed as legal conclusions, the board, to wit, the sovereign, dictator Fahey was empowered by fiat to appoint a conservator or receiver and to order the reorganization, consolidation, merger or liquidation of such association forthwith, without prior notice, hearing, opportunity to be heard, and without any requirement for the taking of testimony, the hearing of witnesses or the presentation of proof of any kind as to the commission or non-commission of the legally concluded offenses charged. [R. 282, No. 206.1 Rules and Regulations for Federal Savings and Loan Associations, adopted January 25, 1943, 8 Fed. Reg. 1180.]

The first few words used in the commencement of Section 206.1 of such regulation indicated what powers and authority the defendant-appellant Fahey considered himself to possess. They read

> "Whenever in the *opinion* of the Federal Home Loan Bank Administration any Federal Savings and Loan Association;"

and thereafter follows a list of some ten legal conclusions.

> ". . . the Federal Home Loan Bank Administration may appoint a *conservator* for such federal association. . . . etc." (Section 206.1, *supra*.)

There is not even the customary requirement of a finding, the sovereign Fahey, according to his own rules and regulations, does not even have to be reasonably satisfied that any of the so-called offenses have been committed before he orders the seizure of such association and its assets, and destroys it.

By such edicts of seizure and appointment of conservators, the defendant-appellant Fahey provides by the regulations enacted by him (Section 207.3) for the summary removal, without notice or hearing of the directors and officers of such accused association and provides that

> "... such officers and directors, or any of them shall not thereafter have, exercise, or act in connection with, any such rights, powers or privileges, or any asset or property of any nature of the association; provided, however, that nothing herein shall deny to such officers and directors the right from time to time to address such petitions, authorized by the board of directors, as they may have to the Federal Home Loan Bank Administration, or its representatives designated to receive such petition concerning such association, or to represent the association in hearings provided for in these rules and regulations." (Sec. 207.3, Rules and Regulations for Federal Savings and Loan Associations, 8 Federal Rules and Regulations 1180.)

The defendant-appellant Fahey did permit such associations, their directors and officers to retain the one constitutionally guaranteed right of petition. Otherwise such rules and regulations themselves did not even provide the ordinary safeguards of due process required by the constitution (Amendments IV and V).

It is to be noted that these revised rules and regulations adopted by the one man board Fahey did not provide nor did they establish any procedure for, nor allow, nor authorize, nor permit any appeal to the duly constituted courts of justice of the United States of America nor of any state thereof.

Such revised rules and regulations adopted January 25, 1943, 8 Fed. Reg. 1180 deleted and omitted therefrom the prior regulations of the five man non-political board and the requirement for an automatic hearing after ten days' notice "mailed to all shareholders, borrowers and creditors of the association. . . ." (Former regulations Section 46, *supra.*)

A careful reading of these revised rules and regulations adopted by the defendant-appellant Fahey January 25, 1943, 8 Fed. Register 1180) discloses that while a so-called administrative hearing is provided for under certain limited conditions whereby the defendant-appellant Fahey may be petitioned only by the dispossessed accused directors and officers through his minions to reconsider his own acts in having issued his edict for the appointment of a conservator and the seizure of such association and possibly even its liquidation, merger or dissolution (as was done in the Los Angeles bank matter, *supra*), these fiats are absolutely barren of any provision for independent notice to the shareholder members, the true mutual owners of such association or for their being permitted to be independently represented or independently heard at such prejudged administrative hearing.

The inconsistency of this is apparent from the mere statement. If the opinion of the defendant-appellant

Fahey were to have been reasonably and properly arrived at it would indicate that at least in his opinion the dispossessed directors and officers of such seized associations were dangerously unqualified to represent the shareholder members, the true mutual owners of such association, yet, by his same edict (Section 206.2, Revised Rules and Regulations, *supra*) the only representatives such shareholder members are specifically permitted to have at said so-called prejudged administrative hearing are the very same dispossessed directors and officers whom the defendant-appellant Fahey has deemed to be unfitted to represent them, as even such prejudged so-called administrative hearing is to be had only if "within fourteen days (Sundays and holidays included) after the appointment of a conservator or receiver for a federal association not at the time of such appointment in the hands of a conservator, such Federal association, which has not by its board of directors, consented to or requested the appointment of a conservator or receiver, *may* file an answer and serve a written demand for a hearing, *authorized by its board of directors*, which demand shall state the address to which notice of hearing shall be sent."

It is to be noted that demand for even such an improvident, prejudged, unjust hearing can only be made if "authorized by its board of directors" the very people who within the preceding fourteen (14) days (Sundays and holidays included) have been deemed, in the opinion of the one man board, to be unfitted, incapable or unworthy of continuing to manage the affairs of such association.

In the case of *Scott v. McNeal*, 154 U. S. 34 (1893), the Supreme Court in discussing the matter concerning a creation of a state court and the deprivation of property without due process of law, states:

> ". . . The 14th Article of Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains, 'nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the state, whether through its legislative, its executive or its judicial authorities. *Ex parte Virginia* (*"Virginia v. Rives"*), 100 U. S. 313, 318, 319 (25:667, 669); *Ex parte Virginia*, 100 U. S. 339, 346 (25:676, 679); Neal v. Delaware, 103 U. S. 370, 597 (26:567, 574). And the first one, as said by *Chief Justice Waite in United States v. Cruikshank*, 92 U. S. 542, 554 (23:588, 592), repeating the words of *Mr. Justice Johnson in Bank of Columbia v. Okely*, 17 U. S. 4 Wheat. 233, 244 (4:559, 561), was intended *'to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.'* . . ." (Emphasis added.)

While the XIV Article of Amendment was there under consideration, the same fundamental principle applies to the interpretation of the IV and V Articles of Amendment which are restraintive of the powers of the Federal Government and are herein applicable.

In discussing judicial proceedings, and "due process of law" when applied to judicial or so-called judicial pro-

ceedings, Mr. Justice Field, in the case of *Pennoyer v. Neff*, 95 U. S. 714, 733, defines "due process of law" to

> "mean a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is by the law of its creation—to pass upon the subject matter of the suit and if that involves *merely* a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state or his personal appearance." (Emphasis added.)

Congress enacted no law authorizing the defendant-appellant the sovereign Fahey to create any courts for the trying of the validity of his, the dictator's own fiats issued by him for himself.

Neither Section 5(d) nor any other part of the Home Owners Loan Act authorizes the defendant-appellant Fahey to create so-called administrative tribunals for the purpose of ousting the regular duly constituted courts of the land of their jurisdiction.

Even if it were to be considered that the omitted safeguards of due process required by the Constitution were to be subsequently adopted, it is apparent that the ones here adopted by this dictator-sovereign did not provide the constitutionally required safeguards of due process, for

> "No one, no matter how exalted his public office or how righteous his private motive, no man can be judge in his own case. That is what courts are for." *U. S. v. Lewis, supra.*

This discloses a progression from democracy to dictatorship unparalleled in the annals of the history of our country, although not unknown to the modern history of foreign nations.

(c) Provisions Sufficient to Satisfy the Constitutional Requirements of Due Process Must Be Contained Within the Enactment Itself. The Congressional Act Within Itself Must Require Notice and Provide the Right to Hearing and to Be Heard and the Failure So to Do Permits the Making of Rules and Regulations, as Has Here Been Done, for the Seizing of Property Without Due Process of Law, and Thus the Federal Home Owners Loan Act of 1933 Is Unconstitutional as Being Repugnant to the Fourth and Fifth Amendments of the United States Constitution.

Ohio Valley Water Co. v. Ben Avon, 253 U. S. 287 (1920).

Pennsylvania Public Service Company Law of July 26, 1913 (laws of Pennsylvania—1913. p. 1375) was held invalid as the State Supreme Court,

> "interpreted the statute as withholding from the court's power to determine the question of confiscation according to their own independent judgment when the action of the commission comes to be considered on appeal" * * *

and as so interpreted that was considered to deny "due process" and thus to be unconstitutional although the Act there specifically within itself set up entire procedure for full hearing upon notice before the Commission and for the Judicial Review of the Commissioner's rules, regulation, finding, determination or order, by way of injunction. (Section 17, 22 and 31.)

Whereas, in the instant case no provision whatsoever is made within Section 5(d) nor any other part of the H.O.L.A. as enacted by Congress for any hearing, to say nothing of any judicial review, and it is worthy of note that the defendant Fahey as Commissioner and sole director is apparently of the opinion that the Federal Home Loan Act of 1933, the Act of Congress here under consideration, gives his authority to foreclose and prohibit any possibility of any judicial review by the officers and directors of the confiscated association, as he has by his Regulations, Section 207.3 of Title XXIV, Code of Federal Regulations, Part VI, adopted January 25, 1943, provided that:

Section 207.3 SUCCESSION.

"Immediately upon the posting of the notice on the door of such Federal Association as provided in paragraph (2) of Sec. 207.2 of these rules and regulations, the conservator shall succeed to all the rights, powers and privileges of the Federal association, its officers and directors, or any of them. *Such officers and directors or any of them shall not thereafter have, exercise, or act in connection with, any such rights, powers or privileges, or any asset or property of any nature of the association: Provided,* however, that nothing herein shall deny to *such officers and directors* the *right* from time to time *to address such petitions, authorized by the Board of Directors, as they may have to the* Federal Home Loan Bank *Administration or its representatives designated to receive such petitions* concerning such association, or to represent the association at hearings provided for in these rules and regulations."

(Emphasis added.)

Where, as here, the act does not provide for an adequate opportunity for a proper hearing, it apparently is incomplete and fatally defective as not protecting the requirements of "due process" and thus permits the making of rules, as here, which deny a fair and impartial hearing; thus the act is unconstitutional and is repugnant to the Fifth Amendment to the Constitution.

(d) The Notice Required, as an Element of Due Process, Is an Essential Part of the Statutory Provision and Not Only to Be Awarded as a Mere Matter of Favor or Grace.

Coe v. Armour Fertilizer Works, 237 U. S. 413 (1915).

Section 2677 of Florida General Statutes of 1906, as amended, which provided that judgments against corporations could be converted *ex parte* into judgments against stockholders, also here held to be unconstitutional as it permitted the taking of property without providing due process of law, the court therein stated:

> "Thus construed, and as applied in this case, we think Section 2677 is repugnant to the 'due process of law' provisions of the Fourteenth Amendment, which requires at least a hearing, or an opportunity to be heard, in order to warrant the taking of one's property to satisfy his alleged debt or obligation; and in our opinion the other sections do not adequately supply the defect.
>
> . . . . To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits.

Rees v. Watertwon, 19 Wall. 107, 123, 22 L. Ed. 72, 77.

Nor can extra official or casual notice or a hearing granted as a matter of favor of discretion, be deemed a substantial substitute for the due process of law that the Constitution requires.

In Stuart v. Palmer, 74 N. Y. 183, 188, 30 Am. Rep. 289, which involved the validity or a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the court said: *'It is not enough that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard!*

The soundness of this doctrine has repeatedly been recognized by this court. Thus in Security Trust & S. B. Co. v. Lexington, 203, U. S. 323, 333, 51 L. Ed. 204, 208, 27 Sup. Ct. Rept. 87, the Court, by Mr Justice Peckham, said, with respect to an assessment for back taxes: 'If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor, notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, *but the question is whether any notice is provided for by the statute*' (citing the New York case). So, in *Central of Georgia R. Co. v. Wright*, 207 U. S. 127, 138, 52 L. Ed. 134, 141, 28 Sup. Ct. Rep. 47, the court said: 'This notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace.'

In *Roller v. Holly*, 176 U. S. 398, 409, 44 L. Ed. 520, 524, ... Sup. Ct. Rep. 410, the court declared:

> 'The right of a citizen to due process of law, must rest upon a basis more substantial than favor or discussion.'

And in *Louisville & N. R. Co. v. Central Stock Yards Co.*, 212 U. S. 132, 144, 53 L. Ed. 441, 446, 29 Sup. Ct. Rep. 246, it was said:

> 'The law, itself must save the parties' rights, and not leave them to the discretion of the courts as such.'" (Emphasis added.)

There must be found in the law itself a reasonably clear formula by which the grantee of legislative power granted must be governed.

An Act which does not lay down rules and definitions by which the administrative officers may be guided in the exercise in the discretion vested in him is incomplete.

The test is whether the provisions are within the Act of Congress itself are sufficiently definite and certain to enable one reading it to know his right and obligation.

It is expressed by the court in the case of *Wichita Ry. & Light Co. v. Public Utilities Com.*, 260 U. S. 48, 59 (1922):

> "In creating such an administrative agency the legislature, to prevent it being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and set forth certain rules for its guidance in the performance of its function. It is a wholesome and necessary principal that such an agency must operate through the procedure and rules enjoined, and show a substantial compliance therewith to give validity to its actions."

A biased administrative tribunal does not afford due process as statutes purporting to confer legislative powers on administrative officials are invalid as denying due process (....., 261 U. S. 165 (1923).)

Property cannot be taken under order of an official or board without notice, since the due process clause extends its protection to such a taking of property; *Boeing Air Transport v. Farley*, 75 F. (2d) 765.

The law authorizing administrative hearings must require notice or it will be unconstitutional. In the case of *Seal v. Utah-Idaho Cent. Iron Co.*, 305 U. S. 177 (1938); p. 182, the court stated:

> "The requirement of a 'hearing' has obvious reference to the tradition of a judicial proceedings in which evidence is received and weighed by the trier of the facts.' The 'hearing' is 'the hearing of evidence and argument.' *Morgan v. United States*, 298 U. S. 468, 480. *And the manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist. Interstate Commerce Comm'n v. Louisville & Nashville R. Co.*, 227 U. S. 88, 91." (Emphasis added.)

Because the act there under consideration contained within itself such requirements it was held to be constitutional.

In *Chester C. Fosgate Co. v. Kirkland*, 19 Fed. Supp. 152 (1937) (D. C. Florida), plaintiff sought to enjoin the Secretary of Agriculture and his subordinates from the enforcement of the Agricultural Adjustment Act. (U. S. C. A., Sec. 608c.)

The court then held that the Secretary of Agriculture was not an indispensable party. (p. 156.)

The contention was made by the defendant control committee that plaintiffs should first pursue their administrative remedies before resorting to the court. *The court held that because the Act was void, the administrative provisions would fall with it.* (p. 157.)

The court, however, added that the questions involved were questions of law and not administrative questions and *that the Secretary of Agriculture in any event had no jurisdiction to determine such questions.* The court also stated that the:

> "so-called administrative provisions of the Agricultural Adjustment Act entirely dispense with the right of trial by jury guaranteed by the seventh Amendment to the Federal Constitution as applied to the determination of such questions as are embodied in said petitions." (p. 157.) *"It is a further fundamental element of due process of law that no judge shall try his own case.* Sections 608(b) and 608(c) of 7 U. S. C. A. require that the Secretary of Agriculture shall be one of the contracting parties to any marketing agreement executed pursuant to the act, and yet the Secretary is set up as the judge to try issues of fact and issues of law attacking the validity of such an agreement." (Emphasis added.)

In other words, the Secretary cannot be both party and judge. (p. 157.)

The court also held that Sections 608(b) and 608(c), undertaking to authorize the approval of marketing agreements by the Secretary of Agriculture and undertaking to define his powers and duties, are severally void because

they undertake to delegate to the Secretary legislative power contrary to Article 1 of the Federal Constitution. (p. 162.)

The court stated that the provisions of the Agricultural Adjustment Act were similar to those in the acts involved in the *Ryan* and *Schechter* cases. (p. 162.)

The Act was then held to be an unconstitutional delegation of legislative power contrary to Article 1, and the Fifth Amendment to the Constitution.

The legislature may not, under the guise of protecting public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations, citing:

> *Lawton v. Steele*, 152 U. S. 133, 137, 14 S. Ct. 499, 501.

The District Court added that the rule there stated was equally applicable to an act of Congress, such as this Act.

The court further cited as authority on the general subject the leading case of:

> *Yick Wo. v. Hopkins*, 118 U. S. 356.

Asher v. Ingels, 13 Fed. Supp. 654 (D. C. Calif., 1936), wherein the California Vehicle Code on registration of out of State cars in California held unconstitutional by three judge court, as the permits given not granted as a matter of right:

> "It may or may not be granted arbitrarily by the department of motor vehicles. California Vehicle Code, Sec. 147." (p. 659.)

In *Roller v. Holly*, 176 U. S. 398, the defendant was served with summons in a foreclosure matter in Virginia. The action was commenced in Texas where the property was located.

> *"The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."* (p. 409.) (Emphasis added.)

Property cannot be taken under order of an official or of a board without notice, since the due process clause extends its protection to prohibit such a taking of property.

> *Boeing Air Transit v. Farley*, 75 F. (2d) 765 (1935).
>
> "Here the question of right of Postmaster General to cancel contracts for the carriage of air mail and to impose penalties without prior notice, hearing or opportunity to be heard, as permitted by Postal Act (3950 Rev. St. U. S., 39 U. S. C. A. 432), was sought to be enjoined."

The court, after finding that such mail contracts were "property," quoted at length from the case of *Ochoa v. Hernandez y Morales*, 230 U. S. 139.

Due process of law was defined as follows:

> "Without the guaranty of 'due process' the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in that Charter (2 Coke, Inst. 45, 50), and has been recognized since the Revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition

of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

Dismissal affirmed on other grounds, to wit: Government has not consented to be sued.

Hovey v. Elliot, 167 U. S. 409 (1897).

Arose out of order for contempt. Bill in original action dismissed for contempt. (p. 410.)

"Can it be doubtful that due process of law signifies a right to be heard in one's defense." (p. 417.)

If not provided it is violative of the Constitution.

Inland Steel Co. v. National Labor Relations Board (1940, C. C. A. 7).

Petition to set aside order of the National Labor Relations Board, 29 U. S. C. A., Secs. 151-166.

Order set aside and remanded to Board for new hearing.

"That a trial by a biased judge is not in conformity with due process is sustained by the authorities. In *Tumey v. Ohio*, 273 U. S. 510, 535, 47 S. Ct. 437, 445, 71 L. Ed. 749, 50 A. L. R. 1243, the court said:

'No matter what the evidence was against him, he had the right to have an impartial judge.'

The court, in *Jordan v. Massachusetts*, 225 U. S. 167, 176, said: 'Due process implies a tribunal both

impartial and mentally competent to afford a hearing. . . ." (p. 20.) The court quoted from *People v. Naimark*, 154 App. Div. 760, 139 N. Y. S. 418, 420, where it said: 'the first idea in the administration of justice . . . is that a judge must necessarily be free from all bias and partiality. *He cannot be both judge and party, arbiter and advocate in the same cause. Mankind are so agreed in this principle that any departure from it shocks their* common sense and sentiment of justice." (p. 20.)

Not only is Section 5(d) of the H.O.L.A. entirely barren of any semblance of a requirement that the rules, enactments, the board (now the one man board) is authorized to make should contain any of the safeguards of due process required by the Constitution, but likewise a searching of the entire H.O.L.A. itself fails to disclose any such requirements.

The Act does not make any mention of, nor require that the acts, fiats or edicts which the so-called board is authorized to enact shall contain any provision for notice, hearing, opportunity to be heard, right to be confronted with the accusers, right of subpoenaing of witnesses, nor any of the other exceptions for recognizing rudiments of due process. There is no prohibition any place within Section 5(d) of the H.O.L.A., nor anywhere else in the entire Act itself, which prohibits the board—now solely composed of the defendant-appellant, the sovereign Fahey, from issuing his own edicts, appointing himself or his

minions, both prosecutors and judges, and in truth and fact, this is exactly what he has done.

After the seizure of the association and all of its assets, including the seizure of all records, documents and evidence which were needed for their defense and protection, graciously and magnanimously ordered that a hearing should be held and appointed one of his subordinates to act as hearing officer, but provided that he "shall not have power to decide any motion to dismiss the proceedings or other motions that involve final determination of the ultimate issue; . . ." but allowed the hearing officer to adjoin the hearing from time to time and to do such things as are necessary and proper to the orderly conduct of such hearing, but he "shall not have power to finally determine the ultimate issue. The announced purpose of the said order was to permit the association, without its records or any evidence, to "appear and show cause why the conservator should not have been appointed and why an order should be entered by the Federal Home Loan Bank Administration (the appellant-defendant, the sovereign Fahey who had appointed the conservator in the first place), discharging the conservator." [R. 94-96.]

It appears from the mere reading of this order that the defendant-appellant, Fahey the sovereign, now seeks to also be chief justice and to reserve unto himself the power to pass final judgment upon himself and his own acts. In the face of this mockery of justice and the duly constituted courts of our lands, the mere fact that no notice

is provided, nor was any given to the shareholder members, the true mutual owners of the association and all of its assets, is probably of small consequence. The shocking disregard by even a public official of the fundamental concepts of justice and the reversion to the pre-revolutionary day reign of governing the people by rule of fiat is probably one of the most important issues in this case. Such retrogression in the concepts of justice was recently rejected by this court less than two months ago when in the case of *U. S. v. Louis, et al., supra,* in one of the opinions it was stated that "'a government of laws, not of men' was the rejection in positive terms of rule by fiat whether by the fiat of governmental or private power. Every act of government may be challenged by an appeal to the law as finally pronounced by this court," and further in the same opinion it was stated by this court, "no one, no matter how exalted his public office, nor how righteous his private motive, can be judge in his own case, that is what courts are for." Hence, once again, it is demonstrated that not only is the Home Owners Loan Act entirely barren of any requirement that the fiat and edicts which it authorizes, the board now consisting of one man, defendant-appellant Fahey, to enact, be likewise the fiats and edicts actually enacted and issued pursuant to this delegated unfettered legislative power in themselves also violates and shocks the concepts of natural justice as well as being repugnant to the Constitution and in violation of the Constitution that are deprivation of private property.

B.

Collateral Procedural and Jurisdictional Questions Attempted to Be Raised by the Defendant-Appellants in an Effort to Divert This Court From Passing Upon the Unconstitutionality of Section 5 (d) H. O. L. A.

We next turn to a brief consideration of the various attempts made by the deefndant-appellants to divert this court's attention from the main and primary issue of this case, to-wit, the unconstitutionality of Section 5(a) of the Home Owners Loan Act of 1933. In the main these are the same "red herring" issues which were loosed by the defendant-appellants in the Pacific in an effort to divert the statutory three-judge trial court's attention from the main primary issue of unconstitutionality and these issues should now be as dead as that same proverbial "red herring."

None of these collateral issues, irrespective of how decided by this Honorable Court would be determinative of this litigation, but could only result in the requirement of further litigation. Whether these plaintiff-appellees are ultimately required to commence their action by submitting to a biased predetermined so-called administrative hearing before being allowed to enter the doors of the courts of justice of the United States or whether or not these plaintiff-appellees should be deemed deprived of their right to challenge the unconstitutionality of an enactment of Congress, or whether the statutory three-judge court is to be required to spend further valuable time taking irrelevant testimony conclusively establishing the arbitrary biased acts of the defendant-appellants, or whether these plaintiff-appellees are to be required to com-

mence their litigation on the Atlantit Coast instead of upon the Pacific Coast where their homes are located would not aid this court one whit in determining the unconstitutionality of Section 5(d) of the H.O.L.A.

I.

The Exhaustion of Administrative Remedies Is Not a Prerequisite Where No Valid Unbiased Administrative Hearing Is Afforded.

This Honorable Court's attention is respectfully directed to the fact that these plaintiff-appellees, as a shareholder members protective committee, suing as representatives of some sixteen thousand (16,000) shareholder members of the Long Beach Federal Savings and Loan Association commenced this action by appropripate complaint and pleadings in the District Court of the United States for the Southern District of California, Central Division, on May 27, 1946 [R. 1], some eight days before the so-called administrative hearing, Order No. 5309 was issued on June 5, 1946 [R. 94].

Further it should be borne in mind that the plaintiff-appellees, the Shareholder Members Protective Committee did not, nor so far as the record discloses, did any of the sixteen thousand shareholder members of the Long Beach Federal Savings and Loan Association, other than the dispossessed directors and officers, ever request any so-called administrative hearing.

By the provision of Section 206.2 of the Rules and Regulations promulgated by the defendant-appellant Fahey, the only request for a so-called administrative hearing which could be made would have first to be authorized by its board of directors, the very persons ac-

cused by the defendant-appellant, the prosecutor Fahey, with unsupported charges of being unfit to represent the shareholder members.

If Section 5(d) of the Home Owners Loan Act is unconstitutional, as contended by the appellees and is found so to be by the statutody three-judge court especially created and charged by an Act of Congress with this responsibility, then the so-called administrative hearing alleged proffered would be bottomed upon an unconstitutional act. Such a so-called administrative hearing would have not even quasi-judicial authority. The unconstitutionality of the Act makes the proffered offer of a so-called administrative hearing void *ab initio*. A law authorizing an administrative hearing must require notice or it will be unconstitutional as lacking in providing due process.

Shields v. Utah-Idaho Railroad Co., 305 U. S. 177 (1938), at 182.

Nowhere in the Home Owners Loan Act is there a single word authorizing the creation of a system of courts for so-called administrative hearings or otherwise.

Nowhere is there any requirement of notices, pleadings, evidence of trial, findings of fact, or decision of juries or judgments.

Nowhere is there any authorization to create courts with the power of swearing witnesses or to compel the production of evidence, to subpoena witnesses or to require them to answer or to hold them in contempt or to incarcerate contemptors.

The act being entirely barren of any mention of these historic incidents of due process, it can hardly be stated

that the H.O.L. Act enacted by Congress provides or affords any due process against the taking or property.

In the case of *Ochoa v. Hernandez*, 230 U. S. 139 (1913), the United States Supreme Court, clearly enunciated the principle:

> The guaranty of due process of law inhibits the taking on one man's property and giving is to another, contrary to settle usuages and modes of procedure, without notice and opportunity for a hearing. . . . "Without the guaranty of 'due process' the right or private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in that Charter (2 Coke, Inst., 35. 50), and has been recognized since the Revolution as among the safest foundations of our institutions. *Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usuages and modes of procedure, and without notice or an opportunity for a hearing.*" (Emphasis added.)

In the case of *Chester C. Fosgate Company v. Kirkland*, 19 Fed. Supp., page 152 (1937), the District Court of Florida in an action to enjoin the Secretary of Agriculture and his subordinates from the enforcement of the Agricultural Act held that he was not an indispensable party, and denied the defendant's contention that the plaintiff should have first pursued their administrative remedies before resorting to the courts upon the ground that because the act was unconstitutional and therefore found the admin-

trative provisions thereof would fall with it, and further held that in any event, the Secretary of Agriculture had no jurisdiction to determine questions of law which were not administrative questions.

In so holding the court stated that the "so-called administrative provisions of the Agricultural Act entirely dispense with the right of trial by jury guaranteed by the Seventh Amendment to the Federal Constitution as applied to the determination of such questions as are embodied in said petitions." And at page 157 stated:

> "It is a further fundamental element of due process of law that no judge will try his own case."

Nowhere in Section 5(d) or elsewhere in the H.O.L. Act is there any authorization specified or implied empowering the board now composed of one man to create a system of courts, nor to clothe them with the necessary authority to subpoena and swear witnesses, to determine contempts, nor to place in custody contemptors.

In the case of *Myers v. Bethlehem Shipbuilding Corporation*, 303 U. S. 41-53 (1937), the Court after pointing out that the National Labor Relations Act contained ample statutory provisions providing for hearing and that its enforcement could only be had through appropriate courts with adequate opportunity for judicial review which afforded ample compliance with the constitutional requirements of due process, decided that Congress had power to vest exclusive jurisdiction in the Board and the Circuit Court of Appeals. Furthermore, the Court stated:

> "Since the constitutionality of the Act has been determined by our decision in *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 301

U. S. 1, 108 A. L. R. 1352, and the defect in the bill is incapable of remedy by amendment, its dismissal should be directed."

Thus again we see that this Court has consistently followed its own rule that adequate standards and statements of legislative policies, together with appropriate safeguards of the constitutional requirements of due process must be contained within the Congressional enactment itself.

We do not understand the contention of the defendant-appellants Ammann and Fahey that they, their hearing officers and associates are superior to or endowed with great powers to judicially hear and determine matters, than those normally vested in the United States District Court. We therefore assume that the general rule that "statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect." is admittedly inapplicable in the instant case. (*U. S. v. United Mine Workers*, 91 L. Ed. Adv. Op. 595, decided March 6, 1947.)

In a suit brought by the United States against the State of California, *U. S. v. California*, 297 U. S. 175 (1935), to recover a penalty for violation of the Federal Safety Appliance Act, the State argued it was not subject to the act because of its sovereign rights. This Court disposed of this argument (pp. 188-189) by stating the argument was "not persuasive when weighed against the complete appropriations of the Court (District) and venue selected for the trial of issues growing out of the particular activity in which the state has chosen to engage."

There being no intimation anywhere in the Home Owners Loan Act of 1933, as amended, of even the semblance of a delegation by Congress to the Board (now composed of one man, the defendant-appellant Fahey) of any power, authority or rights to create courts nor to clothe them with the powers of subpoena of witness, or holding in contempt and of imposing fines and jail sentences upon contemptors, it would appear that the Board did not have any such powers, authorities, rights or privileges, pre-existing or otherwise.

Therefore, since the provisions of Section 380(a), Title 28, adopted August 24, 1937, specifically denies to the judges of the District Courts of the United States and to the justices of the Circuit Courts of the United States sitting individually, the authority and jurisdiction to issue any injunction, either interlocutory or permanent "suspending or restraining the enforcement, operation or execution of, setting aside, in whole or in part, any Act of Congress upon the ground that such Act or any part thereof is repugnant to the Constitution of the United States," we submit that the exclusive jurisdiction to hear an issue of this type is in the three-judge court provided in Section 380(a) and we hardly believe that the defendant-appellants Ammann and Fahey and their associates could create an administrative tribunal authorized to grant the relief prayed for in the brief to issue an injunction to restrain *themselves* from acting or continuing to act under an Act of Congress upon the ground that such Act or a part thereof is repugnant to the Constitution of

the United States. Therefore, the relief prayed for in the instant case, to-wit, injunctions to restrain further actions under an unconstitutional Act of Congress, could not have been obtained in the so-called administrative tribunal, even had a fair administrative tribunal been available; and for these plaintiffs to have made application for such a hearing before a prejudiced administrative tribunal which was without power to grant the relief sought and prayed for, to-wit, the declaration of an Act of Congress to be unconstitutional, would have been an idle act.

Therefore the proper and in fact the only place for the commencement of this action seeking a determination of constitutionality of an Act of Congress and injunctive relief to restrain the proceedings thereunder was in the United States statutory court composed of three judges especially created for that purpose and charged by Congress with the primary responsibility of determining the unconstitutionality of acts of Congress. (Sec. 380(a), Title 28, U. S. C.)

The primary purpose of the defendant-appellant Fahey, who now would wear the robe of a justice in urging that these plaintiff-appellees must first exhaust their administrative remedies and ask his judicial favor is to deprive and circumvent the duly constituted courts of their jurisdiction to hear and determine the unconstitutionality of enactments of Congress.

II.

Plaintiff-Appellees Are Not Estopped to Raise the Question of Unconstitutionality of a Part of an Act of Congress.

(a) Estoppel Is Not Applicable to Prevent an Unconstitutional Portion of an Act From Being So Declared Unconstitutional.

Estoppel is an equitable defense. Courts of equity will only grant their benign protection to those who come with clean hands, and then only for the purpose of preventing a wrong. Estoppel is a shield, not a sword, to be used in administering the *coup de grace* or to extinguish the life of a healthy, valid, growing organism such as this Association. The worthwhile achievements of this Association in the financing of homes for more than eight thousand southern California residents and in providing safe investments (safe, at least, until the time of seizure by defendant-appellant Fahey) for its approximately 16,000 shareholder members, has been a great benefit to its home community, the city of Long Beach, and, in fact, to all of southern California. These worthwhile accomplishments of the Association explain why the aroused citizenry of southern California, and, in fact, all of the sovereign state of California, have aided and are aiding and assisting this, the peoples', Association from being destroyed by the ruthless uncalled for seizure without notice or hearing by the defendant-appellant Ammann, the minion of the sovereign defendant-appellant Fahey.

Counsel for the defendant-appellants take the position that the plaintiffs-appellee can not raise a constitutional question because the legislation they seek to attack on con-

stitutional grounds is the same act under which this Association is organized and has operated.

In the first place, the court's attention is called to the fact that the Long Beach Federal Savings and Loan Association is not a corporation organized under any state corporation act, as is true of many plaintiffs in the cases cited in the brief by counsel. Furthermore, it must be kept in mind that the Association here involved is not a corporation at all in the sense and under the definition usually conceded to that title.

In the second place, it must be further kept in mind that plaintiff-appellees do not seek to attack the act under which the Association was organized generally, but that these plaintiff-appellees are taking the position that the particular section of said act, providing for regulations, is unconstitutional because of the manner in which it endeavors to provide for such regulations. It is not attempted in this litigation to state that the entire act or acts providing for the federal savings and loan associations are unconstitutional.

Estoppels are generally classified as one of the following kinds:

1. By deed
2. By matter of record
3. By matter *in pais*, which last are also termed equitable estoppels. (See Bouvier's Law Dictionary, Rawld's Edition, Vol. 1, p. 1078.)

It is the third type of estoppel generally called estoppel *in pais*, or more appropriately called equitable estoppel or quasi estoppel, which is here involved. Under that type of equitable defense, courts have in instances prohibited

parties from questioning the constitutionality of an act under which they had been incorporated on the theory that the charter secured by the corporation was a contract between the corporation and the governmental agency or the government so issuing it.

However, in order to maintain such a position and to finally hold that such a party can not challenge the constitutionality under which it is organized, it is submitted that the challenge must go to the entire act or must go to some part thereof which can not be disassociated from or separated from the rest of the act.

> "The mere fact . . . . that a coporation is organized under a statute does not estop it to deny the constitutionality of a provision of the statute which constitutes a distinct legislative enactment and the elimination of which would leave in full force the provisions under which the corporation was organized."
>
> Corpus Juris Secundum, Vol. 16, Sec. 90, p. 189;
>
> *Seaborn v. Wingfield*, 48 P. (2d) 881, 56 Nev. 269;
>
> *Philadelphia, etc. Railroad Co., Petitioner*, 53 Atl. 181, 203 Penn. 354.

It is submitted, therefore, that in the instant case, the plaintiff-appellees having made no attempt to have declared the entire act unconstitutional but seeking only to have declared unconstitutional that section of the act having to do with the delegation of authority that therefore the cases cited by the counsel for defendant-appellant to the effect that plaintiff-appellees are estopped to present the unconstitutionality of those sections, are inapplicable.

It is furthermore submitted that these plaintiff-appellees have at no time asserted any rights under the statutes, nor have they taken any affirmative steps to do so, and that under such circumstances they are further exempted from the inhibition to attack the constitutionality of the act, or a part thereof.

Buck v. Kuykendall, 267 U. S. 307;

Thompson v. Consolidated Gas Utilities Corporation, 300 U. S. 55;

St. Louis Malleable Casting Co. v. George C. Prendergast Construction Co., 260 U. S. 469.

Furthermore, the doctrine of estoppel *in pais* has been held inapplicable to one who has not been guilty of fraud, or whose conduct has not misled another as to validity of a statute simply because he has treated as legal and valid an act void and open to the inspection of all.

O'Brien v. Wheelock, 184 U. S. 450.

Thus, it has been held in instances that one will not be estopped by his acts or omissions to question the constitutionality of a statute if his adversary is not thereby prejudiced.

Van Camp Seafood Co. v. Newbart, 76 Cal. App. 445.

And furthermore, the application of the doctrine asserted by counsel for defendant-appellants has been decidedly limited by the holding that where representation as to the validity of a statute can not have been relied on by his adversary, there can be no estoppel.

Eyers Woolen Co. v. Town of Gilsum, 84 N. H. 1;

Morehouse v. Employers Liability etc. Co., 119 Conn. 416.

It is submitted that "there is no such thing as a void enactment being made valid by estoppel," as the court stated in *Central Branch Union Pacific R. Co. v. Smith*, 23 Kan. 745, 754, where a corporation was allowed to deny the validity of a statute under which bonds were issued by it.

If the section of the act attacked here as unconstitutional is void because unconstitutional and being unconstitutional it does not exist it is difficult to follow reasoning which brings the non-existent or dead act to life by the negative action of estoppel.

While cases will hold that a person will be presumed to have entered into a contract with reference to existing laws it is submitted "valid laws" are meant and that only the provisions of the contract which are not unlawful, but are legally enforceable will control the parties thereto.

In *Morse v. Metropolitan S. S. Co.*, 88 N. J. Eq. 325, the Court recognized this reasoning and stated:

> "The fact that the defendant incorporated under an act, which contained an unconstitutional provision cannot render the provision enforceable, now confer any power on the court to enforce it."

Estoppel as a result of a prior position in judicial proceedings "cannot be invoked however, where the position first assumed was taken as a result of ignorance, or mistake or through the act or fault of the party claiming the estoppel; and, clearly, cannot be invoked where the position complained of is not inconsistent with a former position."

31 Corpus Juris Secundum 372, Estoppel, Sec. 117.

Here, the officers of the defendant Long Beach Federal Savings and Loan Association, and they only could ask for the administrative hearing. When they learned of the bias and prejudiced attitude of the defendant-appellant Fahey and that he would personally endeavor to pass on his own wrongful acts, the subject of the complaint herein, the said officers still did not change their position of asking for an administrative hearing, but did object to the procedure and to the personalities, endeavoring to assume a judicial character. There is nothing inconsistent in a party plaintiff objecting to the defendant appearing as the prosecutor and also as judge and jury and appeal court as well. That essentially is the position of the officers of the Long Beach Federal Savings and Loan Association.

The position of the plaintiff-appellees representing the 16,000 shareholder members is even stronger. Are they all to be estopped from even presenting to this court this, their petition to have an unconstitutional act, under which their life savings have been seized, from being declared unconstitutional.

It is submitted no estoppel has arisen because of any taking of benefits under the charter of the Long Beach Federal Savings and Loan Association, as there is now absolutely no governmental finances of any kind, or character whatsoever in the Association.

Electric Co. v. Dow, 166 U. S. 489 (1897), cited by counsel for defendant Ammann is not in point, as it does not involve an estoppel to the raising of the constitutionality of an act, under which charters of incorporations have been issued.

Grand Rapids & Indiciana Rwy. Co. v. Osburn, Commisisoner of R. R., 193 U. S. 17, 24 S. Ct. 310 (1903),

is not in point, as the matter there was one of rates, which were established by a State Act, under which the company was incorporated and was then charging rates, and had at all times been charging rates, under the very provisions of the Act, which was there sought to be attacked.

The claim that invalid regulations are part of the Association's charter is not sound, as has heretofore been pointed out.

It is again submitted that only valid laws and regulations may be considered to be a part of a charter.

When the Association received its charter in 1934, amendments to the regulations could only be promulgated by a five man Board and that

> "not more than three members of the Board shall be members of the same political party." (Section 1437, Title 12, Federal Home Loan Bank Act, Federal Code.)

Likewise, there were then regulations specifying means of redress from wrongful actions by the Administration. When the defendant-appellant Fahey became the dictator and repealed the regulations providing redress from wrongful acts, which so changed the safety and assurance of doing business of not only the defendant-appellee, but of all federal savings and loan associations; now subject to the caprice of the defendant-appellant Fahey, there was a change of circumstance, since which time the defendant-appellee has not accepted any of the benefits, now financing from the Federal Government, under this Act or any part thereof.

The remaining cases cited by counsel for the defendant-appellants, all come within the distinguishing features heretofore pointed out in connection with other cases cited.

(b) The Defendant-Appellants Ammann and Fahey, Who Now Urge the Equitable Doctrine of Estoppel to Prevent These Shareholder Members From Raising the Question of Unconstitutionality, Should More Properly Under the Rules of Good Conscience and Equity Be Themselves Estopped.

The defendant-appellants Ammann and Fahey now urge that the provisions of the Association's charter constitute an estoppel barring these, the plaintiff-appellees, from raising the question of unconstitutionality of Section 5(d) of the Home Owners Loan Act of 1933, as amended, which unlimitedly delegates unfettered legislative authority to enact legislation dealing with the subjects of dissolution, consolidation, reorganization and merger and the appointment of conservators. By this same charter (A. B. 37) it was provided that:

> "The association shall have perpetual succession and power . . . to wind up and dissolve, merge, consolidate, or reorganize in the manner provided by law and rules and regulations made thereunder;
>
> The association shall have such powers as are conferred by law and shall exercise its powers in conformity with the Home Owners' Loan Act of 1933 and all laws of the United States as they are now, or as they may hereafter be amended, and with the rules and regulations made thereunder which are NOT IN CONFLICT WITH THIS CHARTER." [R. 164.]

If it is deemed that the estoppel here attempted to be raised by the defendant-appellants Ammann and Fahey is an estoppel by contract, it would appear that the rule of estoppel by contract might well be here more properly invoked against the defendant-appellants Ammann and Fahey themselves.

The charter upon which they rely as a contract was entered into by the "Board", which was then composed of five men and was non-political in character by virtue of the specific provisions of the Act of Congress.

The defendant-appellant Fahey, having now become by successive steps the sole member of the "Board", and having taken on the attributes of a dictator by his adoption of a policy of administration highlighted by the watchword "rule or ruin", now seeks to abnegate his predecessor's contract.

The charter, the so-called contract, provides that "The association shall have perpetual succession and power . . ." [R. 164], yet the defendant-appellant Fahey now seeks to destroy and terminate the perpetual succession of such Association.

Likewise the charter, the so-called contract, specifically provides by its own terms that the rules and regulations made under the Home Owners Loan Act are only applicable to this Association in so far as they "ARE NOT IN CONFLICT WITH THIS CHARTER". [R. 164.]

Yet, now the defendant-appellant Fahey endeavors to impose upon these plaintiff-appellees, representing the 10,000 shareholder members of the Association, his fiats and edicts for the appointment of conservators and to "wind up and dissolve, merge, consolidate, or reorganize"

this Association; although by the same charter, which he claims estops these plaintiff-appellees from questioning the constitutionality of the enactment of Congress, provides within itself that "the association shall have perpetual succession and power . . . to *wind up and dissolve, merge, consolidate, or reorganize* in the manner provided by law and rules and regulations made thereunder; . . ."

It is far more logical that the defendant-appellants Ammann and Fahey are estopped by the powers to dissolve, merge, consolidate, or reorganize having been delegated to the Association by their predecessors (the five-man non-political Board) than that these plaintiff-appellees representing the 10,000 shareholder members, most of whom no doubt were not members at the time of the issuance of this charter, should be estopped by such fallacious reasoning from presenting to the duly constituted courts of the land the question of the unconstitutionality of Section 5(d) of the Home Owners Loan Act.

Further, the first charter of the Association contained paragraph 15 as follows:

> "The association shall at all times be subject to the provisions of the Home Owners' Loan Act of 1933, providing for Federal savings and loan associations, and to any amendments thereof, and to any *valid* rules and regulations made thereunder as the same may be amended from time to time." [R. 160.] (Emphasis added.)

The plaintiff-appellees submit that rules and regulations bottomed upon an unconstitutional statute are not "valid".

Therefore, the plaintiff-appellees, and the 16,00 shareholder members and residents of southern California whom they represent, should not be estopped by *invalid* rules and regulations which, in the first place, because of their invalidity would not be binding upon the Association in any event.

It has already been amply pointed out that the rules and regulations so-called existent at the time of the issuance by the five-man non-political Board which chartered this Association did, invalid though they may have been, attempt to provide some semblance of the rudiments of due process and at least establish a policy of affording associations to be heard and to be confronted by their accusors before their seizure, dissolution or merger, and to follow a policy of affording notice of such seizure and opportunity to be heard, to the true owners of such mutual association thereof, the shareholder members. (Sections 45 and 46 of original Rules and Regulations enacted June 13, 1943 by five-man non-political Board.) [R. 281-283.]

Thereafter, by successive steps, even these rudiments of due process were eliminated as the defendant-appellant Fahey transmuted the federal home loan administration from the democratic, purely supervisory agency authorized by Congress into a thing of oppression for the furtherance of his own dictatorial policy of rule or ruin.

These plaintiff-appellees are here primarily attacking the unconstitutionality of Section 5(d) H. O. L. A. which unlimitedly delegates unfettered legislative powers without any provision for the constitutionally required safeguards of due process. Unconstitutional though the so-called rules and regulations, fiats and edicts of the defendant-appellant Fahey may be, that is not the primary question before this Honorable Court, but rather only reveals the unlimited extent to which a dictator will go when clothed with "a roving commission to inquire into evils (even imaginary) and upon discovery correct them" according to his own whim or caprice. (Interpolation added.)

These United States are a united nation, indivisible, and founded upon the declared principle that all citizens are afforded equal protection under the Constitution; and yet the defendant-appellants Ammann and Fahey would have this court divide this nation into two classes of people: those afforded the protection of the Constitution and those to whom the protection of the Constitution is denied, by a so-called estoppel.

We submit this Honorable Court will not permit itself to be misled by the defendant-appellants' falacious reasoning in their efforts to divert this court's attention from the primary question, to-wit: that passing upon, determining and declaring that Section 5(d) of the H. O. L. A. is unconstitutional as being an unlimited delegation of unfettered legislative authority, without providing any of the constitutionally required safeguards of due process.

III.

The Decree Was Not Premature.

Defendant-appellants contend the court erred in entering a final judgment (A. B. 90-95). In support of this contention defendant-appellants argue (A. B. 93) a judgment should not be entered before answer or trial. This argument is not supportable in view of the situation which existed at the time the decree was entered.

The various motions came on for hearing before the three judge statutory court on July 15-16, 1946 [R. 607-704, Rep. Tr. and R. 306-308 and 317-318 Clerk's Minutes]. Among the matters presented to the Court at that time was the defendant-appellant Ammann's motion to dismiss [R. 317] and the defendant-appellant Fahey's motion to dismiss or in lieu thereof to quash service of summons [R. 317]. Briefs and affidavits for and against these motions had previously been served and filed and oral argument took place [R. 318-491]. The Court properly took the view [Opinion R. 375] that the motions to dismiss were based on the ground "that the provisions of Sec. 380(a) have no application to the law and facts as presented by said application" and "that the instant proceeding seeks to restrain the operation of rules and regulations promulgated by the Board rather than the enforcement, operation or execution of or setting aside in whole or in part of an act of Congress on the ground that the law itself is unconstitutional. We think the contention is without merit" [R. 375].

The Court in its opinion [R. 375-376] then stated its reason for ruling against the motions to dismiss as being that the authority to do the acts sought to be restrained, if found to exist, must "bottomed on subsection (d) of

Section 5" of the Act and stated, "It is on the direct operation of this statute that the commisisoner must rely.

Threatened action under the authority of the statute is sought to be restrained on the ground that the statute is unconstitutional and void in that it attempts to confer legislative power on the board. Clearly this proceeding comes within the provisions of Section 380(a) and the question is required to be heard by a three-judge court"

The findings of fact followed the opinion with the finding the defendant Fahey had been properly served [R. 495] and the Court concluded the motions to dismiss and to quash service should be denied [R. 495] and it was so ordered [R. 496].

Jurisdiction having been acquired and the remaining issues being, in the words of Judge Orr, "bottomed on subsection (d) of Sec. 5" [R. 375-376] of the Act and the issue of the constitutionality of that subsection having been exhaustively presented to the court by affidavits, points and authorities and oral argument [R. 607-704] both before and after hearing [R. 704] and the court being advised of all facts having to do with the question of constitutionality did not require the idle motions of requiring a trial and so rendered its decision on the main issue of constitutionality and the issues governed by the decision thereon [R. 489-500]. Any other course would have involved nothing but procedure, time and expense on the part of the Court, counsel and parties. The three-judge court was convened under Sec. 380(a) of Title 28 U. S. C. to pass upon the question of constitutionality and it did so. Having done so there was no reason for not making the injunction a permanent one.

In a comparable situation Judge Paul McCormick of the Southern District of California, in the case of *Coca-Cola Company v. Los Angeles Brewing Company*, 1 F. R. D. 67, in passing on a motion for a preliminary injunction to restrain the use of the term "coke" after ascertaining that a further hearing would be useless, proceeded to make his injunction permanent and in doing so used the following language in his opinion:

> "What is there here that can be modified or changed or that needs any further exploration? What factual situation is there that could be more definitely presented to the court in January than today? I think there is nothing. There may be many more affidavits filed on each side of the question. There may be a great deal of oral testimony developed on both sides of the issue. There may be extensive arguments made as to the effect of these matters, but upon analysis, the same issue will be present. If this is the case it should be determined summarily."

The right of a Federal Court, sitting in equity, once having assumed jurisdiction to give a complete remedy and to issue a permanent injunction upon the hearing upon the motion for a preliminary injunction is not a point *de novo*. It has been decided by this court in the case of:

Sterling v. Constantin, 287 U. S. 378,

wherein this court in the person of Chief Justice Hughes, in affirming the order of a three-judge statutory court in granting an interlocutory and permanent injunction, even as was done by the court below in this proceeding, re-

strained the governor and certain military officials of the State of Texas from enforcing military orders restricting the production of plaintiffs' oil wells, stated at page 393 as follows:

> "The jurisdiction of the district court so constituted and of this court upon appeal, extends to every question involved, whether of state or federal law, and enables the court to rest its judgment on the decision on such of the questions as in its opinion effectively dispose of the case."

The attention of the court is respectfully directed to the fact that issues of fact have not been raised by the pleadings and that the sole question before the court is one of law, to wit: the constitutionality of that section of the Home Owners Loan Act under which the appellants have assumed to act.

Another case wherein an interlocutory and final judgment was entered by the trial court upon an application for the preliminary or interlocutory injunctions was that of:

Allegheny Oil Co., v. Snyder, et al., 106 Fed. 764. (Certiorari denied in 181 U. S. 618.)

That case was one wherein a preliminary injunction was sought to stay the acts of the lessee under an oil lease executed subsequent to the lease held by the complaining party. At the hearing, and in previous hearings in the state court, the first lease was held to have been valid

and therefore the attempted second lease had necessarily failed. In its opinion the Court stated:

> "In such cases in courts of the United States may proceed to administer final relief without putting the parties to the expense and delay of protracted litigation. Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 20 S. C. 708, 44 L. Ed. 856, citing with approval, Cardt v. Brown, 113 Ill. 475; Green v. Mills, 16 C. C. A. 516, 69 F. 852, 25 U. S. App. 383; and the decision of this court in Mayor etc. of Knoxville v. Africa, 23 C. C. A. 252, 77 F. 501, 47 U. S. App. 74. Finding no error in the decrees entered in the court below, the same will be affirmed."

Under the provisions of Rule 54 of the Federal Rules of Civil Procedure the court was authorized to determine the issues material to a particular claim "at any stage."

This rule provides in part as follows:

> "(b) When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counter-claims arising out of the transaction or occurrence, which is the subject matter of the claim, may enter a judgment disposing of such claim.
>
> "(c) . . . Except as to a party against whom a judgment is entered by default, every final judgment shall grant relief to the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

From the foregoing it should be clear that:

1. More than one claim having been presented by the plaintiff-appellees and some of the other appellees, and the Court having found upon one claim that the statute in question, and on which the defendants Ammann and Fahey must rely, was unconstitutional and void, that a judgment can and should be entered on that claim.

2. In granting such judgment the Court can and must give all relief necessary as demonstrated by the pleadings on file.

The decision of the three-judge court was essentially a decision on the law and did not involve a question of fact once the jurisdictional facts were established. This being so a further hearing on facts would be of no aid in determining the question of constitutionality.

If the law is found to be unconstitutional the defendant-appellants were mere trespassers and their seizure under a void act would necessarily be unlawful and it follows that the management elected by the owners, to wit: the shareholder members, should be restored to possession. The Court having found the subsection in question to be repugnant to the constitution therefore did the only logical and possible thing for it to do—it ordered the return of possession of the Association in its decree.

IV.

Jurisdiction.

Throughout the hearing in the court below and in their pleadings filed herein, the defendant-appellants have consistently urged that the jurisdiction of the trial court was predicated on Section 112 of Title 28 U. S. C. In this regard they have apparently entirely overlooked the exception contained in Section 112 itself which provides in part as follows:

> ". . . except as provided in Sections 113 to 118 of this title, no special suit shall be brought in any district court against any person by any general process or proceeding in any other district than that whereof he is an inhabitant."

As has already been pointed out, *supra*, this action was not commenced under Section 112, it was in fact, commenced under Section 118 of Title 28 U. S. C. Section 118, being an express exception from the provisions of Section 112 covers actions which are *in rem* and all actions to be brought for the purpose of removing any encumbrance or lien, or cloud upon the title to real or personal property within the district where such suit is brought. In view of the fact that it is admitted that all of the assets and property of the association are located within the jurisdiction of the United States District Court of the Southern District of California (A. B. 49) it cannot be disputed that the *res*, the subject matter of the action, is within the territorial jurisdiction of the court. Likewise all of the trespassing acts of the defendant-appellant Ammann took place within the boundaries of that district [R. 3]. The acts of said defendant-appellant undoubtedly caused a lien or cloud upon the property of the

association inasmuch as said defendant-appellant by his various fiats undertook to, and did, take over the bank accounts of the association and did deal with them as he saw fit, even going to the extent of withdrawing several million dollars from one bank and redepositing them in another bank of his own choosing [R. 387]. In addition to these acts, said defendant-appellant saw fit to, and did, purchase stock in the purported Federal Home Loan Bank of San Francisco, and did exchange the stock in the Federal Home Loan Bank of Los Angeles, belonging to the association, for additional stock in said Federal Home Loan Bank of San Francisco [R. 387]. He has likewise sold bonds of a total value of approximately six hundred fifty thousand dollars ($650,000.00) belonging to the association and has reinvested some of these funds in other bonds which he himself has seen fit to purchase [R. 394]. Said defendant-appellant also pledged securities of the Association to the purported Federal Home Loan Bank of San Francisco in the amount of seven million dollars ($7,000,000.00) as for his loans [R. 396].

Even were all of the foregoing not considered as sufficient indices to the claim of the defendant-appellant Ammann to the assets of the Association, it was such an act by him which was made an impelling cause for the filing of its cross-claim in interpleader by the trustee Title Service Company, when the defendant-appellant Ammann undertook to so far supersede the authority of the officers and directors of the Association as to peremptorily execute requests for reconveyances to the one hundred and seventy-four deeds of trust wherein the Home Investment Company was the trustor, and deliver the same to the Title Service Company, with his demand that it reconvey upon

the strength of his perempted authority [R. 247 and 251]. As is readily seen from the succession of events thereafter in the proceedings in intervention by the Home Investment Company, referred to and described, *supra* [R. 253, 254, 318, 319], the defendant-appellant Ammann undertook this exercising of his claimed authority prior to the payment to him of the funds necessary to pay off the promissory notes secured by the deeds of trust executed by said Home Investment Company. This is further evidenced by the delay by the Home Investment Company in procuring and depositing the sum of approximately eight hundred thousand dollars ($800,000.00) in payment of said promissory notes, which payment was made into the Registry of the District Court of the Southern District of California [original affidavit of Lloyd S. Whaley and order thereon, Tr. p. 542, designated but omitted in printing].

It is earnestly believed and urged that the foregoing evidence of the exercising of his claim of right and title to the assets of the Association by the defendant-appellant Ammann clearly brings the principal action within the provisions of Section 118 of Title 28 U. S. C. It is not believed that there can be any serious claim that the assets of the Association hereinbefore described did not constitute "property." Should there be any doubts on this score, the same are completely set at rest by the case of *Omaha National Bank v. Federal Reserve Bank*, 26 F. (2d) 884, wherein it was decided by the Circuit Court of Appeals that certificates of deposit were "property" within the meaning of this section. Certainly if mere certificates of deposit are considered to be property, the actual physical assets in money and securities owned by the Association and seized by the defendant-appellant

Ammann under the direction and fiat of his superior, the defendant-appellant Fahey, must, necessarily, be considered to be property.

Defendant-appellants apparently forgot that the action was *in rem* at the time their petition was filed in April of this year when they sought a writ of mandamus and/or prohibition, and/or injunction, for in Paragraphs 1, 2(a) the defendant-appellants make the following statement:

> "On May 27, 1946, appellees Mallonee, *et al.* (Shareholder Members Protective Committee) brought this action in the district court for the southern district of California. *They prayed for the return of the Association to the old management as well as for other relief.*"

So by their most recent move it is clear that the defendant-appellants *now consider the action to sound in rem.*

It is submitted that the complaint itself [R. 15] is the best authority to determine what the case is primarily about, for in the prayer of the bill of complaint the *first seven paragraphs all have to do with removing the defendant-appellants from the possession* of the shareholder members' *property*, that the defendant-appellants account for the same and that a judgment be entered declaring the rights, obligations and duties of the parties in respect to the property, and, pending the judgment, restraining the defendant-appellants here from merging, commingling, liquidating or otherwise hiding the assets of the Association from the true owners of same.

Section 118 of Title 28 U. S. C., contains a recitation of its own jurisdictional requirements. It is submitted that these have been met by the complaint herein:

(a) There are adverse claims beclouding the titles to many parcels of real property and extensive personal property located in the district in which the action is brought.

(b) One or more of the defendant-appellants are not inhabitants of the district.

(c) The plaintiff-appellees are trying to remove the clouds on the property described above.

(d) The court has made an order requiring the absent defendant-appellants to appear, and pursuant to said order, defendant-appellant Fahey has been served and has appeared in this case.

(e) The person in possession or in charge of the property to wit, the defendant-appellant Ammann, has been served with process.

Contention is made that under the rules normally applicable "suit was not properly brought against Fahey in the southern district of California and that court did not obtain jurisdiction over him. Judicial Code, Section 51, 28 U. S. C. 112; . . ." Perhaps counsel for defendant-appellants were unaware that Section 112 of Title 28 U. S. C. expressly makes exception to actions brought under Section 118 of the same title, and that Section 118 provides that service may be had upon absent defendants "wherever found."

The two cases most nearly in point are *Bede Shipping Co. v. N. Y. Trust Co.*, 54 F. (2d) 658, and *Spellman*

v. Sullivan, 43 F. (2d) 762, affirmed in 61 F. (2d) 787. Other cases in point in the same question are:

Walla Walla v. Walla Walla Water Co., 172 U. S. 1. (Tax cloud on personal property.)

Jellenik v. Huron Copper Mining Co., 177 U. S. 1 (1899). (Involved stock; dismissal was reversed.)

Slagle v. Spellman, 15 F. (2d) 292 (1926). (Section 57 of Judicial Code extends jurisdiction of the district court to include interest in personalty.)

Thompson v. Emmett Irrigation District (C. C. A. 9), 227 F. 560 (1915), (C. C. A. 9th). (Derivative suit on behalf of bond holders to remove cloud. Dismissal reversed.)

As may be seen from the cases cited above, all of the elements to jurisdiction are present. These are:

(a) Adversity of suit.

(b) Claim to, or cloud, on title to property.

(c) The requisite order for appearance served upon the defendant-appellant Fahey.

It is submitted that the court should also consider the convenience of parties and witnesses and the multiplicity of suits. The defendant-appellant Fahey is the only party not served in California. In addition to the formal plaintiffs and defendants there are better than a dozen cross-claimants in intervenor. There is also to be considered the convenience of the thousands of shareholder members and borrowers. Surely this is a proper case for Mohammet to go to the mountain. The practical aspects of such a situation were discussed in *First National Bank of Canton v. Williams*, 252 U. S. 504, in which case this

court held the district court in Pennsylvania had jurisdiction.

Even were the primary jurisdiction of the court predicated on Section 118 of Title 28 U. S. C. insufficient, which is not conceded, the jurisdiction of the District Court for the Southern District of California, is definitely tied down by the provisions of the interpleader Statute, Title 28 U. S. C. 41 (26) and by Rule 22 of the Federal Rules of Civil Procedure. Both Statute and the Rule are merely codifications of the old equity principle and rule of long standing which permit the adjudication by a court of competent jurisdiction of the rights of adverse claimants to property held by a disinterested third party.

Immediately upon learning of the audacious act of the defendant-appellant Ammann in presuming to demand reconveyance of one hundred and seventy-four (174) deeds of trust, the plaintiffs joined the defendant-appellee Title Service Company as a party to the action by causing to be served upon it a copy of the complaint together with an alias summons. Contemporaneously therewith, the officers and directors of the Association advised the Title Service Company that if it should comply with the demands made by the defendant-appellant Ammann for a reconveyance, that it, the Association, would hold said Title Service Company liable for any monetary damages which might ensue thereby. It is understood that even up to this time that the defendant-appellant has never formally advised the appellee Title Service Company, of his claimed appointment or his purported authority. It is respectfully submitted that immediately upon the filing of this cross-claim in interpleader and its bill in the na-

ture of interpleader by the appellee Title Service Company that the jurisdiction of the court below became absolute, pursuant to the provisions of the interpleader statute, *supra*. All of the necessary elements for the interpleader are set forth in that statute and interpreted in the case of *Railway Express Agency, Inc., v. Jones*, 100 F. (2d) 301, and confirm that the jurisdiction of the court below became absolute and its jurisdiction became nationwide. The elements as set forth in the Railway Express case are: (a) a verified bill, (b) the having in possession by the interpleader and the deposit of property in excess of five hundred dollars ($500.00), (c) two or more adverse claimants, citizens of different states claiming to be entitled to such money or property, and (d) the deposit of such property with the Registry of the Court.

It is respectfully submitted that all of these elements existed in the case below, as evidenced by the verified cross-claim filed by the Title Service Company [R. 30] and the deposit by it of the one hundred seventy-four (174) promissory notes, trust deeds and requests for reconveyance [R. 35], the existence of two or more adverse claimants, citizens of different states (the Association a resident of California on the one hand, and the defendant-appellants Fahey and Aminann, residents of Massachusetts and Maryland, respectively, on the other hand [R. 261, 304]) and the actual deposit of the securities in the Registry of the Court. [R. 35.]

The interpleader statute above cited, like Section 118, *supra*, also operates *in rem*. It was not necessary that the defendant-appellant Fahey appear in the action in order to give the court absolute jurisdiction to decide the

issues and to remove the claims of the defendants and appellants Fahey and Ammann. Under the provisions of Section 118 and upon the making by the court below of the order for service upon the defendant-appellant Fahey and the service there by upon him, together with the services upon the Attorney General and the United States attorney for the Southern District of California [R. 51], the jurisdiction of the court below was acquired beyond any question of a doubt. It is true that such situation left the defendant-appellant Fahey with the necessity of electing one of two unpleasant alternatives. The first of these was to sit idly by and allow the court to make its judgment, which very probably would have been adverse to him. The other horn of the dilemma was to submit himself to the jurisdiction of the court below. An examination of the entire record shows to what lengths the defendant-appellant Fahey has gone to avoid submitting himself to such jurisdiction and he is even now in this distinguished tribunal seeking to show by devious means that none of the courts of the United States have or had jurisdiction to decide this matter.

That the defendant-appellant Fahey, as the superior of the defendant-appellant Ammann, was not an indispensable party is definitely established by the case of *Colorado v. Toll*, 268 U. S. 228, wherein this court reversed the District Court which had dismissed an action against the Secretary of the Interior upon the theory that he was an indispensable party in an action of the Sovereign State of Colorado to set aside regulations as to speed limits made by the superintendent of a national park, which was located within the physical confines of the State of Colorado. In making such reversal this court held in no un-

certain terms that although the Secretary of the Interior would have been a desirable party, that he was neither a necessary nor an indispensable party in carrying out an act of his subordinate, which was beyond the power and right of such subordinate to make. So, likewise, in the case of *Jones (Postmaster) v. Schachelton Inhaler Company*, 132 F. (2d) 116; the Circuit Court of Appeals held that the Postmaster General was neither a necessary nor an indispensable party in an action to set aside a fraud order which would have prohibited the plaintiff-appellee from using the United States mails. Most certainly, if the Act of Congress, under which the defendant-appellant Fahey made his purported appointment of the defendant-appellant Ammann as conservator, was void as has been hereinbefore demonstrated, the defendant-appellant Fahey was neither a necesary nor an indispensable party to a declaration of the unconstitutionality of that Act. The enjoining of the merger of the assets of the Association and the enjoining of the administrative hearing necessarily followed from an adjudication of the unconstitutionality of Section 5(d) of the Home Owners Loan Act, and such enjoining was well within the provisions of the court below under the provision of subdivision (c) of Section 41 (26), U. S. C., wherein it is provided that in any proceeding interpleader or in the nature of interpleader, that the District Court shall have the power to enjoin claimants from instituting or prosecuting any proceedings against the subject matter of their respective claims and that such jurisdiction is nationwide. This right was borne out in the case of *Trinces v. Sunshine Mining Company*, 99 F. (2d) 651, which was affirmed by this court in 308 U. S. 66. In addition to being the authority and precedent for the principle above set forth that

case likewise adjudicated the fact, as set forth in subdivision (e) of the interpleader statute that it matters not that more than one claimant to the interpleader fund or property may be residents of the same state, but that it is sufficient if one or more of the adverse claimants are non-residents of that state.

Even were the law on the foregoing not sufficient to confer an absolute jurisdiction on the court below, the jurisdiction of that court is further bolstered by the filing of the cross-claim in interpleader of the defendant-appellant Robert H. Wallis wherein he physically deposited in the Registry of the court a cashier's check, wherein he was made the payee in the face amount of fifty thousand dollars ($50,000.00) and to which there are adverse claimants in the persons of the defendant-appellee Wallis and the Association, both residents of California, on the one hand, and the defendant-appellants Fahey and Amiann, residents of Massachusetts and Maryland, respectively, on the other hand.

In view of all of the foregoing it is most respectfully submitted that the jurisdiction of the court below was absolute on the three grounds: (1) the provisions of Section 118, Title 28, U. S. C., under which the formal action was brought and; (2) under the provisions of the Interpleader Act, Title 28, Section 41 (26), Rule 22, Federal Rules of Civil Procedure; and (3) the long line of equity decisions giving the courts of equity absolute jurisdiction in interpleader cases.

C.

Section 5 (d) of the Federal Home Owners Loan Act of 1933 Is Severable From the Balance of the Act.

The Act itself (June 13, 1933, c. 64, Sec. 1, 48 Stat. 128, Title 12 U. S. C. Sec. 1461 *et seq.*) provides for its own severability. Section 1468 of Title 12 U. S. C. (Section 9 of the Act), provides as follows:

> "If any provisions of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby."

Subdivision (i) of Section 5 (Section 1464, Subd. (i), Title 12 U. S. C.), has already been declared to be unconstitutional by this Court in the case of *Hopkins Federal Savings & Loan v. Cleary*, 296 U. S. 315. In that case this Court held that insofar as this Act permits conversion of state associations into federal associations in contravention of the laws of the States of their creation it violates the Tenth Amendment to the Constitution.

The defendant-appellants would have the court believe that the affirming of the decision of the court below would destroy the government's power to enforce its supervisory authority (A. B. 45).

No argument in support of defendant-appellants' contention has been made and it is not understood how the contention could be supported. The industry has functioned since the *Hopkins* case decision was rendered in 1935, without the presence of subsection (i) of Section 5. And it is submitted that without subsection (d),

which has been found by the three-judge statutory court to be unconstitutional, that the industry can and, no doubt, will continue to function satisfactorily.

The doors of all of the federal courts, as well as the state courts, are open to the supervising administrative body, and, in case situations develop which can be shown by appropriate examination or other admissible evidence of improprieties in the management and operation of federal savings and loan associations, upon appropriate pleadings the courts can and, no doubt, would appoint receivers and conservators.

Of course, an actual showing of insolvency, threatened insolvency, or improprieties of management would, no doubt, have to be presented to satisfy a federal court and to obtain its intercession. A bald statement of conclusions, unsupported by evidentiary facts, would probably be insufficient.

This, no doubt, is the reason the defendant-appellants Ammann and Fahey have so assiduously avoided in the instant proceedings any application to the courts, and why they are even now endeavoring to deprive this court, as well as all other courts of the land, of an opportunity to hear and determine even the unconstitutionality of an act of Congress.

It is not believed that the elimination of this section will have any adverse affect upon the savings and loan industry, but on the contrary the confidence of the investing public in such associations and the sense of security which will be given to the management of the associations will be greatly enhanced and this field of activity favored by the government and prosper, as the result of such a decision. Whereas, if the decision in the Court below

is reversed the entire industry will be forced to operate under the constant fear that a disaster, such as that which befell the association here, will happen to them also should they incur the wrath or personal dislike of dictator Fahey.

Conclusion.

The plaintiffs-appellees most urgently call upon this Court for protection against the ruthless despotism of the defendant-appellant Fahey.

The need for this Court to rise and protect the weak against the strong was most ably expressed in the opinion in the case of *Chambers v. Florida*, 309 U. S. 227 at 240-241 as follows:

> "The Constitution proscribes such lawless means irrespective of the end. And this argument flouts the basic principle that all people must stand on an equality before the bar of justice in every American Court. Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and

inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion."

Therefore, it is most respectfully urged that this Court has no alternative other than to affirm the judgment of the court below, in its entirety, and continue the long line of uninterrupted affirmations of the basic principle of democracy, commencing with the case of *Brig Aurora Burnside v. U. S.*, 7 Cranch 382 (1813), "that this is a government of laws and not of men" and withheld from a despotic administrator the right to usurp the powers of the Congress of the United States in making his own laws, and to uphold the principle that there shall be no deprivation of property or the rights and liberties of the people, including the 16,000 Shareholder Members of the Long Beach Federal Savings and Loan Association, without due process of law. Such affirmation will again assure the populace who make up our great democracy that no deviation from democracy as they know it shall be allowed to take place, that no administrative officer shall ever lead the country away from its precepts of democracy and that dictation or totalitarianism shall not be allowed to exist.

Respectfully submitted,

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Associate Counsel.

APPENDIX A.

National Industrial Recovery Act, Volume 48, U. S. Statutes at Large, Part 1.

This Act was held partially unconstitutional in the case of Panama Refining Co. v. Ryan, 293 U. S. 388 (1935), and the balance of the Act was held unconstitutional in A. L. A. Schechter Poultry Co. v. U. S., 295 U. S. 495 (May, 1935).

DECLARATION OF POLICY; SECTION 1.

Section 1:

"A National emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacities of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources."

Section 3(d):

"Upon his own motion, or if complaint is made to the President that abuses inimical to the public interest and contrary to the policy herein declared are prevalent in any trade or industry or subdivision thereof, and if no code of fair competition therefor has theretofore been approved by the President, the President, after such public notice and hearing as he shall specify, may prescribe and approve a code of fair competition for such trade or industry or subdivision thereof, which shall have the same effect as a code of fair competition approved by the President under subsection (a) of the section."

Section 9(c):

"The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State. Any violation of any order of the President issued under the provisions of this subsection shall be punishable by fine of not to exceed $1,000, or imprisonment for not to exceed six months, or both."

APPENDIX B.

Agricultural Adjustment Act
Declaration of Emergency and Policy
(Portions)

"Section 601. Declaration of Emergency.—That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of commodities, and has seriously impaired the agricultural assets supporting the national credit structure, it is hereby declared that these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal currents of commerce, in such commodities, and render imperative the immediate enactment of title I of the Act. (May 12, 1933, c. 25, Title I, Sec. 1, 48 Stat. 31.).

"602. Declaration of policy; establishment of base periods for prices. It is hereby declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this act, to establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will re-establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period; and, in the case of all

commodities for which the base period is the pre-war period, August, 1909, to July, 1914, will also reflect current interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate, as contrasted with such interest payments and tax payments during the base period. The base period in the case of all agricultural commodities except tobacco and potatoes shall be the pre-war period, August 1909-July 1914. In the case of tobacco and potatoes, the base period shall be the post-war period, August 1919-July 1929.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section. (May 12, 1933, c. 25, Sec. 2, 48 Stat. 32; Aug. 24, 1935, c. 641, Title I, Sec. 1(a, b), 49 Stat. 750.)

"608b. Marketing agreements.—In order to effectuate the declared policy of this title, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign com-

merce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the anti-trust laws of the United States, and any such agreement shall be deemed to be lawful: Provided, That no such agreement shall remain in force after the termination of this Act. For the purpose of carrying out any such agreement the parties thereto shall be eligible for loans from the Reconstruction Finance Corporation under section 5 (Code, Title 15, Sec. 605) of the Reconstruction Finance Corporation Act. Such loans shall not be in excess of such amounts as may be authorized by the agreements. (May 12, 1933, c. 25, Title I, Sec. 8b; added Aug. 24, 1935, c. 641, Title I, Sec. 4, 49 Stat. 753.)

"608c. Orders.—(1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this title as 'handlers'. Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

(2) Commodities to which applicable.—Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products there-

of (except products of naval stores), or to any regional, or market classification of any such commodity or product: Milk, fruits (including pecans and walnuts but not including apples and not including fruits, other than olives, for canning), tobacco, vegetables (not including vegetables other than asparagus, for canning), soybeans and naval stores as included in the Naval Stores Act (7:91 to 99) and stands established thereunder (including refined or partially refined oleoresin).

(3) Notice and hearing.—Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) Finding and issuance of order.—After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity."

APPENDIX C.

National Bituminous Coal Commission Act of 1937 (50 U. S. Statutes at Large, Part 1, page 72).

Note: This is extracts from the rewritten National Bituminous Coal Commission Act the first of which, to wit, the Bituminous Coal Conservation Act of 1935 (49 Statutes 991, Chapter 824) was held unconstitutional by decision of this court in the case of *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936).

STATEMENT OF POLICY.

"That regulation of the sale and distribution in interstate commerce of bituminous coal is imperative for the protection of such commerce; that there exist practices and methods of distribution and marketing of such coal that waste the coal resources of the Nation and disorganize, burden, and obstruct interstate commerce in bituminous coal, with the result that regulation of the prices thereof and of unfair methods of competition therein is necessary to promote interstate commerce in bituminous coal and to remove burdens and obstructions therefrom."

Section 2(a):

"There is hereby established in the Department of the Interior a National Bituminous Coal Commission (herein referred to as Commission), which shall be composed of seven members appointed by the President, by and with the advice and consent of the Senate, for a term of four years . . ."

Such Commission shall have the power to make and promulgate all reasonable rules and regulations for carrying out the provisions of this Act and shall annually

make full report of its activities to the Secretary of the Interior for transmission to Congress. A majority of the Commission shall constitute a quorum for the transaction of business, and a vacancy in the Commission shall not impair the right of the remaining members to exercise all the power of the Commission. No order which is subject to judicial review under section 6, and no rule or regulation which has the force and effect of law, shall be made or prescribed by the Commission, unless it has given reasonable public notice of a hearing, and unless it has afforded to interested parties an opportunity to be heard, and unless it has made findings of fact. Such findings, if supported by substantial evidence shall be conclusive upon review thereof by any court of the United States. . . ."

Section 6(a), page 85:

"All rules, regulations, determinations, and promulgations of any district board shall be subject to review by the Commission upon appeal by any producer and upon just cause shown shall be amenable to the order of the Commission; and appeal to the Commission shall be a matter of right in all cases to every producer and to all parties in interest, including any State or any political subdivision thereof."

Section 6(b), page 85:

"Any person aggrieved by an order issued by the Commission in a proceeding to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District

of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. . . . ."

Section 6(c), page 86:

"(c) If any code member fails or neglects to obey any order of the Commission while the same is still in effect, the Commission in its discretion may apply to the Circuit Court of Appeals of the United States within any circuit where such code member resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such code member and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript *a cedree* affirming, modifying, or setting aside the order of the Commission. The findings of the Commission as conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper.

"The Commission may modify its findings as to the facts or make new findings by reason of the additional evidence so taken, and it shall file such modified or new findings, which if supported by substantial evidence shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, Secs. 346 and 347).

"(d) The jurisdiction of the Circuit Court of Appeals of the United States or the United States Court of Appeals for the District of Columbia, as the case may be, to enforce, set aside, or modify orders of the Commission shall be exclusive."

Sec. 8. (a):

"The members of the Commission are authorized to administer oaths to witnesses appearing before the Commission and to authorize the taking of depositions in any proceedings; and, for the purpose of conducting its investigations, said Commission shall have full power to issue subpoenas and subpoenas *duces tecum*, which shall be as nearly as may be in the form of supoenas issued by District Courts of the United States. In case of contumacy by or refusal to obey a subpoena issued to any person, the Commission may invoke the aid of any court

of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witness and the production of books, papers, correspondence, memoranda, and other records. Upon the filing of the application for such aid with the clerk of the court the court shall, either in term time or vacation, forthwith enter an order or record, requiring such person to appear before such court at a time stated in the order not more than ten days from the entry of the order (unless for good cause shown such time is extended), and show cause why he should not be required to obey such subpoena, and upon his failure to show cause it shall be the duty of the court to order such witness to appear before the said Commission and give such testimony or produce such evidence as may be lawfully required by said Commission. The District Court, either in term time or vacation, shall have full power to punish for contempt as in other cases of refusal to obey the process and order of such court. Witnesses summoned before the Commission or when depositions are taken upon order of the Commission, shall be paid the same fees as are paid for like services in courts of the United States.

(b) No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other records and documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by

it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subject to any penalty of forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying."

APPENDIX D.

Building and Loan Association Act, State of California. Deering's General Law Act 986, Section 13.12 (The preceding Section 13.11 is quoted in appellants brief p. 122 of Appendix C-3.

Section 13.12. Court Appellant by Association Aggrieved.

"Whenever any association of whose property, business and assets the commissioner has taken possession, as aforesaid, deems itself aggrieved thereby, it may at any time within thirty days after such taking possession apply to the superior court of the county in which the principal office of such association is located, to enjoin further proceedings; and said court after citing the commissioner to show cause why further proceedings should not be enjoined, and hearing the allegations and proofs of the parties and determining the facts, may upon the merits dismiss such application or enjoin the commissioner from further proceedings and direct him to surrender such business, property and assets to such association. An appeal from such judgment enjoining the commissioner from further proceedings and directing him to surrender such business, property and assets to such association shall not operate as a stay thereof, unless the trial court in its discretion shall so order and no bond need be given if such appeal be taken by the commissioner; but if such judgment dismisses such application an appeal therefrom shall not operate as a stay thereof but the court render-

ing such judgment may, in its discretion, enjoin the commissioner, pending the appeal, from further proceedings and direct him, pending the appeal, to surrender such business, property and assets to such association, provided a bond shall be given as required by Section 943 of the Code of Civil Procedure."